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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MICHIGAN MUNICIPAL COOPERATIVE GROUP AND THE STATE OF MICHIGAN,
Petitioners,
v.
FEDERAL ENERGY REGULATORY COMMISSION AND MIDLAND COGENERATION VENTURE, L.P.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

FRANK J. KELLEY
Attorney General
State of Michigan

THOMAS L. CASEY
Solicitor General
State of Michigan

LUIS F. FERNANDEZ
Assistant Attorney General in Charge

LARRY F. BRYA
Assistant Attorney General

Special Litigation Division
630 Law Building
P.O. Box 30212
Lansing, MI 48909
(517) 373-1123
Counsel for the State of Michigan

ROBERT A. JABLON *
THOMAS C. TRAUGER
MARK S. HEGEDUS

SPIEGEL & MCDIARMID
1350 New York Avenue, N.W.
Suite 1100
Washington, D.C. 20005-4798
(202) 879-4000
Counsel for Michigan Municipal Cooperative Group

August 31, 1993

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

The Federal Power Act, as amended by the Public Utility Regulatory Policies Act (PURPA), exempts certain electrical cogenerating facilities from normal utility regulation and allows companies to sell electricity from those facilities at special non-cost-based rates. Ownership of these facilities is limited to non-utilities, *i.e.*, entities "not primarily engaged in the generation or sale of electric power." 16 U.S.C. § 796(18)(B)(ii) (1988). The questions presented are:

1. Was the Federal Energy Regulatory Commission justified in finding without hearing that an electrical cogenerating facility was not utility-owned (a) under the statute, and (b) under its regulations (which prohibit more than 50% ownership or control of such facilities by a utility), where the utility created the facility and

   a. held a nominal 49% interest in the facility;

   b. received hundreds of millions of dollars of additional payments, beyond its 49% share of the facility's profits, from the transfer of utility assets to the facility at inflated prices; and

   c. maintained long-term contracts with and in support of the facility, maintained management authority over the facility, and had contractual relationships with non-affiliated interest holders in the facility?

2. In certifying such an electrical cogenerating facility as a cogenerating facility qualifying for regulatory exemptions under PURPA:

   a. was FERC justified in refusing to grant discovery, a hearing or a conference?

   b. was FERC justified in refusing to give any weight or preclusive effect to relevant findings of a state

regulatory commission acting in a judicial capacity, where the state commission had found that there was an identity between the utility and the cogenerator?

c. was FERC justified in acting contrary to the policies of PURPA and the Federal Power Act that promote the development of electrical cogenerating facilities independent of utilities and promote competition in the electric power industry?

d. was FERC justified in refusing to consider the dictates of the Federal Power Act, which provide for utility rate and other regulation, in addition to the dictates of PURPA, which exempt certain non-utility-owned cogenerating facilities from regulation?

PARTIES TO THE PROCEEDING

The parties to the proceeding before the United States Court of Appeals for the District of Columbia Circuit and herein include the following:

Petitioners below and herein: State of Michigan and Michigan Municipal Cooperative Group (MMCG). MMCG consists of Michigan Municipal Electric Association; the Michigan Public Power Agency, for itself and its members; the Michigan South Central Power Agency, for its members, the communities of Clinton, Coldwater, Hillsdale, Marshall and Union City; the City of Charlevoix; the Village of Chelsea; the Grand Haven Board of Light and Power; the City of Harbor Springs; the Lansing Board of Water and Light; the City of Lowell; the City of Petoskey; the City of Portland; the City of St. Louis; the Traverse City Light and Power Department; and the City of Zeeland; and the City of Bay City as an associate member.

Respondent below and herein: Federal Energy Regulatory Commission.

Intervenor below and Respondent herein: Midland Cogeneration Venture, L.P.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Michigan Municipal Cooperative Group and the State of Michigan, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The judgment of the court of appeals (1a-2a)[1] was issued without an opinion and is reported at 990 F.2d 1377 (D.C. Cir. 1993). The orders of the court of ap-

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[1] The opinions below are reproduced in the Appendix to the Petition for Writ of Certiorari. Citations with an "a" refer to that Appendix. Materials not included in the Appendix but reproduced in the Joint Appendix filed in the court of appeals are referred to as "JA——". Citations to the certified record below are referred to as "R.——".

peals on rehearing (3a, 4a) were issued without opinions and are unreported. The opinions of the Federal Energy Regulatory Commission are reported at 50 FERC ¶ 61,098 (1990) (5a-113a), 50 FERC ¶ 61,259 (1990) (114a-153a), 56 FERC ¶ 61,177 (1991) (154a-185a), 56 FERC ¶ 61,361 (1991) (186a-207a).

JURISDICTION

The court of appeals rendered its judgment on March 26, 1993, affirming orders of the Federal Energy Regulatory Commission, issued January 31, 1990, *CMS Midland, Inc., et al.*, 50 FERC ¶ 61,098, and July 31, 1991, *CMS Midland, Inc., et al.*, 56 FERC ¶ 61,177, and March 1, 1990, *Midland Cogeneration Venture, L.P., et al.*, 50 FERC ¶ 61,259, and September 11, 1991, *Midland Cogeneration Venture, L.P., et al.*, 56 FERC ¶ 61,361. The court of appeals denied timely petitions for rehearing and timely suggestions for rehearing *en banc* on June 2, 1993. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1988).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 706 of Title 5 of the United States Code, Sections 796, 824a-3, 824d, 824e of Title 16 of the United States Code, and Sections 292.101, 292.205, 292.206, 292.207, 292.304, 292.601 and 292.602 of Title 18 of the Code of Federal Regulations are set forth in the Appendix.

STATEMENT OF THE CASE

1. The MCV Project: This case arose when Consumers Power Company (CPC) created an affiliate, the Midland Cogeneration Venture, L.P. (MCV), to which it transferred abandoned facilities from CPC's failed Midland nuclear power plant (JA-1119). MCV sought certification [2] from the Federal Energy Regulatory Commission

[2] Technically, MCV sought recertification, because FERC had granted in 1987 the application of a CPC subsidiary, CMS Midland, Inc., for certification of a Midland facility as a QF. *CMS Midland, Inc.*, 38 FERC ¶ 61,244 (1987). A new certification was required because of substantial changes in the project. (9a, 114a)

(FERC) that the facilities transferred to it were to be considered part of a "qualifying cogeneration facility" (qualifying facility or QF) under the Public Utility Regulatory Policies Act (PURPA). By obtaining qualifying facility status, MCV could obtain exemption from normal electric utility rate and other regulation, 18 C.F.R. §§ 292.601 and 292.602 (1993), thus allowing CPC to pay, and presumably pass on to its customers, higher rates for the electricity that it purchases from its MCV affiliate. This exemption would permit CPC and MCV to charge electricity customers, including households, businesses and industries, potentially billions of dollars in higher rates for the electricity produced by MCV's cogeneration facility[3] than if CPC had simply built an equivalent plant itself.

The essence of the transactions, which are described in more detail below, is that CPC, Michigan's largest utility, acting through affiliates and pursuant to very complicated transactions, sold worthless or nearly worthless plant to MCV in exchange for $1.2 to $1.5 billion in MCV notes. CPC's ability to extract the inflated price for its transferred assets was created by its willingness and ability to pay above-cost PURPA rates for the electricity produced by MCV, which in turn depended upon getting the MCV plant certified as a qualifying facility. CPC also sought to exclude the $1.2 to $1.5 billion proceeds from regulatory control by attempting to transfer the MCV notes to CPC's parent holding company.

Michigan Municipal Cooperative Group (MMCG)[4] and the State of Michigan, Petitioners herein, challenged

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[3] A cogeneration facility produces electricity and steam or other forms of useful energy (such as heat) which are used for industrial, commercial, heating or cooling purposes. 16 U.S.C. § 796(18)(A) (1988).

[4] Michigan Municipal Cooperative Group (MMCG) consists of municipally-owned electric utilities in Michigan, including two municipally-owned power supply agencies that were formed to plan and provide economical power supply for their members, and the Michigan Municipal Electric Association. JA-539-41, JA-1118. MMCG's member utilities provide electricity to over one-half mil-

before FERC and the court of appeals[5] certification of the MCV facility as a qualifying facility on grounds that MCV was owned and controlled by a utility, CPC, and therefore could not qualify for QF certification. Under PURPA, facilities owned by an entity "primarily engaged in the generation or sale of electric power" (*i.e.*, electric utilities) do not qualify for QF status. 16 U.S.C. § 796(18)(B)(ii) (1988). FERC's implementing regulations and decisions limit a utility's ownership interest in a QF to no more than 50%. 18 C.F.R. § 292.206(b) (1993). FERC measures the percentage of ownership by examining the "stream of benefits" to the utility owner from the QF venture and (until this case) by examining the utility's control over the QF. *Dominion Resources*, 43 FERC ¶ 61,079 at p. 61,251 (1988) and *Allegheny Elec. Coop.*, 47 FERC ¶ 61,015 at p. 61,055 (1989) (control); *Ultrapower 3*, 27 FERC ¶ 61,094 (1984) (stream of benefits).

As originally created, MCV was owned 90% by CPC and 10% by Dow Chemical Company (Dow),[6] but CPC would later reduce its nominal ownership to 49% to try to meet FERC's ownership test. While CPC still had a 90% interest in MCV, MCV and CPC entered into various long-term contracts, including one under which CPC

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lion people. MMCG members also purchase power both at wholesale and, to a lesser degree, at retail, from CPC, and are dependent upon CPC for transmission of electricity. MMCG members are listed at p. iii *supra*.

[5] The jurisdiction of the court of appeals was invoked under the Federal Power Act, as amended by the Public Utility Regulatory Policies Act, 16 U.S.C. §§ 791a-825r, and under 28 U.S.C. § 1331 (1988) (general federal question jurisdiction).

[6] Dow received its interest in MCV as a result of a settlement of Dow's claims against CPC arising from the fact that CPC could not get a Nuclear Regulatory Commission operating license for its Midland nuclear power plant for safety reasons and therefore could not fulfill its commitment to sell steam to Dow. The Michigan Public Service Commission (MPSC) has held that costs associated with CPC's failure to complete the plant resulted largely from CPC's imprudence. JA-1567-69; JA-1778-1810; JA-1828-29; JA-1834; JA-1900-01.

agreed to buy MCV's electricity at CPC's claimed "avoided cost rate," pursuant to PURPA. An "avoided cost rate" is determined by the cost which the utility would otherwise incur to provide an equivalent amount of power. 16 U.S.C. § 824a-3(d) (1988); 18 C.F.R. §§ 292.101(b)(6) and 292.304(b)(2) (1993). MMCG and Michigan alleged that the difference between these PURPA rates and what could be charged under traditional cost-based regulation could exceed $4 billion over the initial term of the MCV-CPC power purchase agreement. JA-1920-73. CPC and MCV also agreed on key contractual provisions concerning the plant, including future management, operations, financing and fuel supply,[7] all involving CPC to a significant and continuing extent. (12a-16a); JA-373; JA-1481-83; JA-1124-26; JA-343; JA-1481-82.

Also while CPC maintained its 90% interest in MCV, CPC and MCV contracted for MCV to buy from CPC certain of the abandoned Midland nuclear plant facilities for between $1.2 and $1.5 billion, (14a-16a); JA-290, with the final price to depend upon the price CPC would ultimately pay to its affiliate MCV for MCV's electricity. (142a-43a) The price MCV would pay CPC for those abandoned nuclear plant facilities was far higher than the costs for comparable gas-fired cogeneration plant facilities, according to evidence tendered to FERC by MMCG and the State of Michigan, JA-1349-60; JA-1969, which was not disputed by FERC. (47a-49a) An entire, comparable cogeneration facility could have been constructed from scratch for approximately $800 million, JA-1923, JA-1929, JA-1932, JA-1935-43; JA-1944, JA-1947, JA-1948, JA-1963-69; R.3822.QQ-3822.TT, which is $400 million less than the price that MCV paid CPC for the Midland nuclear plant facilities alone. The total cost of

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[7] JA-545-84. The fuel supply contracts included contracts negotiated by CPC, on MCV's behalf, with Canadian gas suppliers. CPC negotiated the gas contracts in pairs, one for its gas utility customers and one for MCV. The MCV contracts had significantly better terms than CPC's contracts on behalf of its gas utility customers. JA-1400-03.

the MCV facility was $2.3 billion, reflecting the additional cost to convert the Midland facilities to a gas-fired cogeneration plant, plus the $1.2-$1.5 billion paid by MCV to CPC for the abandoned Midland nuclear facilities.

After these arrangements were in place and just days before MCV first delivered power to CPC's transmission grid, CPC reduced its ownership share of MCV to a nominal 49%, thus claiming it no longer "owned" MCV, with partners allegedly independent of CPC (including Dow) holding the remaining interest. (10a-16a; 111a) CPC maintained all other arrangements concerning management and future control of MCV. JA-15-22; JA-457-68, JA-1374-79. CPC also maintained its power purchase agreement with MCV at above-cost PURPA rates. Thereafter, in 1989, MCV submitted to FERC two applications for certification of the Midland facility as a QF, which were required because of substantial changes in the project. *See* (9a, 114a) and *supra* p. 2 n.2.

2. Regulatory Background: PURPA was a 1978 amendment to the Federal Power Act and was part of then President Carter's energy package in response to concerns over fuel efficiency and the nation's energy supply. Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended in scattered sections of 16 U.S.C.). PURPA provides an exception to cost-based regulation, as embodied in the Federal Power Act and in state law. Traditionally, the sale of electricity has been extensively regulated on a cost basis under standards that rates must be "just and reasonable" and not "unduly discriminatory or preferential." *E.g., Federal Power Act*, §§ 205, 206; 16 U.S.C. §§ 824d, 824e (1988); Mich. Comp. Laws § 460.557 (1991). Departures from cost-based rates must be justified. *E.g., Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1502 (D.C. Cir.), *cert. denied*, 469 U.S. 1034 (1984). Regulation is required because of the monopoly control of utility companies and the importance of electricity to the public. *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 758-59 (1973).

The PURPA exception was designed to encourage new developers of cogeneration facilities and other specified types of power plants to enter the electric generation business. This encouragement of cogeneration plants, which produce both electricity and useful steam output, was intended to promote fuel efficiency. *FERC v. Mississippi*, 456 U.S. 742, 750 (1982). To aid the development of QFs, Congress exempted cogeneration facilities "from certain state and federal laws governing electricity utilities" that were perceived by Congress to hinder the development of alternative energy sources. *Id.* at 751.[8] In addition to the regulatory exemption, PURPA required that utilities purchase the electric output from QFs to overcome their reluctance to purchase from non-utility-owned facilities. 16 U.S.C. § 824a-3(f) (1988); *Mississippi*, 456 U.S. at 750-51. These purchases are to be made at the utility's "avoided cost," which is generally higher than the QFs' cost of production. *See generally* Steven R. Miles, Note, *Full-Avoided Cost Pricing Under the Public Utility Regulatory Policies Act: "Just and Reasonable" to Electric Consumers?*, 69 Cornell L.Rev. 1267, 1267-64 (1984).

Congress carefully limited the PURPA exception to the Federal Power Act so that only facilities which are "owned by a person not primarily engaged in the generation or sale of electric power" qualify for the special PURPA rates and for exemption from certain federal and state regulations. 16 U.S.C. § 796(18)(B)(ii).[9] By prohibiting electric utilities from owning QFs, Congress protected the public against higher electric rates and the dangers posed by electric utilities' establishing unregulated affiliate transactions in which they would sell power to themselves at inflated prices. The PURPA ownership restriction is

[8] Pursuant to FERC regulations, QFs are exempt from various provisions of the Federal Power Act, the Public Utility Holding Company Act and state laws and regulations. 18 C.F.R. §§ 292.601 and 292.602.

[9] Cogeneration plants must also meet operating and efficiency standards to obtain QF status. 18 C.F.R. § 292.205 (1993).

"a clear effort to exclude conventional utilities from the QF field. . . ." *Puerto Rico Elec. Power Auth. v. FERC*, 848 F.2d 243, 249 (D.C. Cir. 1988).

FERC has interpreted PURPA's ownership requirements through both regulations and decisions on individual projects. FERC's regulations declare that a facility cannot qualify under PURPA if "more than 50 percent of the equity interest in the facility is held by an electric utility or utilities, or by an electric utility holding company, or companies, or any combination thereof." 18 C.F.R. § 292.206(b).[10] In describing the regulation, FERC explained that:

> the thrust of section 201 of PURPA is to limit the advantages of qualifying status to cogeneration and small power production facilities which are not owned primarily by electric utilities or their subsidiaries.

45 Fed. Reg. 17,970 (1980).

To prevent improper utility ownership under PURPA and its regulations, and in its decisions, FERC has evaluated not merely the nominal ownership shares, but the actual stream of benefits and burdens, including the distribution of profits, losses, and surplus from the facility to the utility owner. *Ultrapower 3*, 27 FERC ¶ 61,094 (1984). Among the other factors FERC has considered in determining ownership are management control, voting interest, and special agreements such as service contracts. *Dominion Resources*, 43 FERC at p. 61,251. FERC has noted that "[t]hough the emphasis has been on the stream of benefits, control is also significant." *Id.* Where the utility owner did not formally possess 50 percent of the equity interest in the company, but where it nevertheless retained control of the facility in question, FERC has refused to grant QF certification and has emphasized:

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[10] The regulations also make clear that wholly or partially owned subsidiaries of electric utilities or electric utility holding companies are included as electric utilities. *Id.*

> To permit [a utility] to effectively avoid the utility ownership restriction while continuing to control the facility merely by restructuring its financial arrangements would result in conferring PURPA benefits on an entity otherwise proscribed from receiving them.

Allegheny Elec. Coop., 47 FERC at p. 61,055.

3. FERC's Orders and the Appeals of the Orders: FERC certified MCV as a QF in orders issued on January 31 and March 1, 1990, and orders denying rehearing on July 31 and September 11, 1991. MMCG and Michigan challenged FERC's action because it permitted a utility to own a QF, contrary to PURPA and FERC's regulations implementing PURPA. Before FERC and the court of appeals, they also urged that in making no real attempt to harmonize the requirements of PURPA and the Federal Power Act, FERC had violated its obligation under the Federal Power Act to protect ratepayers from excessive utility rates. They noted that if regulatory benefits under PURPA are made available to utility affiliates which are not entitled to them, regulation under the Federal Power Act is weakened, and the ability of states to regulate under state law is thwarted, because states are required to accept FERC's QF certifications.

MMCG and Michigan also asserted that the decisions would encourage utilities to establish affiliated QFs, which would be used by utilities to overcharge ratepayers. MMCG and Michigan warned that given the size of the electric utility industry and the importance and pervasiveness of electricity use, combined with the demonstrated incentives, as shown by this case, for utilities to obtain for themselves special PURPA rates, the impact to the economy in Michigan and throughout the nation of FERC's MCV decisions could be enormous. The parties further pointed out that CPC was using its monopoly power over transmission and electricity markets to block competition, including competition from independent QFs and from MMCG, to create markets for MCV's high-priced electricity.

MMCG and Michigan argued that the reduction in CPC's nominal ownership to 49% was insufficient to satisfy PURPA and FERC's standards for determining whether a facility is utility-owned: (1) that the utility not receive more than 50% of the benefits of a facility, and (2) that the utility not control the facility. Both before FERC and later in arguments before the court of appeals, they referred to MPSC orders regarding the identity of interest between MCV and CPC, and proffered extensive evidence regarding the contractual arrangements, relationships and understandings among MCV's co-owners; the functional control over MCV by CPC or its affiliates; the long-term contracts executed by MCV (with counsel hired by CPC) while still 90% owned by CPC; the competitive impacts of approving the MCV plant as a QF; the sale and leaseback arrangements under which CPC became intertwined in the long-term financing of the project; and the inability of, and lack of incentives for, the non-CPC partners in MCV to ensure that CPC's share of the benefits of the venture would not exceed 50%. As MMCG told FERC, CPC and its affiliates are involved on every side of the MCV arrangements, including as seller of power, purchaser of power, lessor, Owner Participant, Loan Participant and fuel supplier. (25a-28a)[11]

FERC and the court of appeals rejected MMCG's and the State of Michigan's positions. FERC said that its action was essentially a declaratory order and that it was based on the information presented in MCV's applications and pleadings. (32a) FERC limited its decision "strictly [to] the facts presented" by the applicant and did not inquire into other factual issues, such as whether the facts were correct, contradicted or even credible. (32a-33a) FERC's decisions were based solely on pleadings, without

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[11] Further demonstration of the identity between CPC and MCV includes statements by William T. McCormick, Chief Executive Officer of CPC and CMS Energy Corp., and Chairman of the MCV Management Committee, to the New York Society of Security Analysts in which he completely blends CPC's and MCV's interests. JA-1380-99. FERC ignored this evidence.

a hearing, investigation, discovery or oral argument. Thus, although FERC relied upon the technical reduction of CPC's ownership in MCV to a 49% ownership share (40a), FERC refused to investigate or permit discovery into whether CPC nevertheless controlled MCV,[12] into whether CPC and MCV had an identity of interest with respect to the project,[13] or into other factual issues, such as whether the facility in fact met the efficiency standards of the regulations (18 C.F.R. § 292.205) applicable to qualifying cogeneration facilities. (44a-77a) It maintained that the "purpose of this proceeding is not to investigate all of the dealings between Consumers Power, CMS, MCV, etc. concerning this project," (35a) and that if the facts as presented by the applicant change or prove false, then the applicant operates the facility at its risk, and "the Commission's order cannot be relied upon . . . ." (32a-33a)

MMCG and Michigan also challenged various aspects of FERC's narrow approach to decision-making on grounds that FERC ignored its obligations under this Court's decisions as well as statutes. FERC refused to consider findings of the Michigan Public Service Commission (MPSC) regarding the identity of interest and self-dealing between CPC and MCV. For example, in a January 31, 1989 order, the MPSC stated (JA-1375-76, 1379):

> *Relationship Between Consumers and the MCV*
>
> Consumers and the MCV would have this Commission believe that their power purchase agreement must be fair and reasonable because it resulted from "arm's-length" negotiations between the parties.

[12] The parties had pointed out that under FERC's regulations concerning persons holding interlocking positions, control was equated with a far lower ownership interest. *See* 18 C.F.R. § 46.2 (d) (1993) (rebuttable presumption of control with 10% ownership).

[13] The MPSC noted, in describing CPC's renegotiation of one of its contracts with MCV, that "one must wonder whether Consumers has once again negotiated with itself and lost." JA-590-91.

> However, the record does not support this conclusion. Rather, the record establishes that the Consumers/MCV contract did not result from arm's-length negotiations.
>
> . . .
>
> The Commission observes that, unlike most arm's-length transactions, Consumers and the MCV share a commonality of interest. Specifically, both Consumers' shareholders and the MCV partners benefit from higher capacity rates and lenient contract provisions. It is interesting then ~~then~~ that the Consumers/MCV agreement was signed by Mr. McCormick on behalf of Consumers and Mr. Paquette on behalf of the MCV.[14]

Subsequently, the MPSC again noted the "blurring of corporate identities" between Consumers Power Company and its affiliates (JA-1372):

> It is also clear that the various transactions between Consumers and its parent company, CMS Energy, and their affiliates were not effected through arm's-length bargaining. All of these corporations are headed by the same individuals and by essentially the same senior staff. The blurring of corporate identities is illustrated by Mr. McCormick's response when asked if he is the chief executive officer of CMS Midland: "I'm not sure of that. I'm not denying it but I'm really not sure." (Tr. 278.) While separate corporations can be given recognition for legitimate and lawful purposes, the corporations created by Consumers and its parent should not be permitted to work an evasion of the Commission's . . . orders, . . . especially when the evasion results in a detriment to the utility and its ratepayers.

These MPSC findings and actions were subsequently upheld by the Michigan Court of Appeals. JA-2066-71.

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[14] Mr. Paquette was the executive vice-president and later president of CPC and was president of MCV when it was formed. JA-1376. Mr. McCormick is Chairman and Chief Executive Officer of CPC and its parent holding company, CMS Energy Corporation, and Chairman of the Management Committee of MCV. JA-1477-79.

FERC turned its back on other issues raised by MMCG and Michigan. For example, FERC refused to consider the competitive implications of accepting MCV as a QF, despite MMCG's arguments, supported by case law and statute, that FERC must take account of antitrust law and policies in considering whether CPC controls MCV so as to preclude improper certification of MCV as a QF. FERC refused to consider whether CPC received special benefits as a result of its sales of gas to the project or of its financing and other arrangements, even though under FERC's test any benefits in addition to its nominal 49% entitlement to profits would be enough to establish that CPC would receive more than 50% of the benefits from the project. FERC foreclosed these examinations, and others, on grounds that it could certify a facility as a QF strictly based on MCV's application, thereby precluding MMCG and Michigan from discovery or any meaningful opportunity to contest certification.

REASONS FOR GRANTING THE WRIT

This case merits the Court's review because FERC's decisions are directly contrary to statute and establish precedent that undercuts long-established federal and state electric utility rate and other regulation. Although it is often considered dull, electric utility regulation probably deals with the single most important industry to the American economy. In permitting electric utilities to own qualifying facilities under PURPA and to engage in inter-affiliate transfer of assets, as occurred in this case, FERC significantly undercuts both federal and state electric rate regulation. FERC's actions create substantial incentives for other utilities to establish affiliates as purported QFs, as happened here, which would purchase assets from the utilities at inflated prices in avoidance of regulatory control. The transactions are of a nature to weaken the financial structure of utilities on which the public is dependent for electric service. The amount of the inter-corporate transfers and associated excessive electric rates can measure in the billions of dollars.

PURPA prohibits utility ownership of QFs. FERC's implementing regulation prohibits certification of QFs that are more than 50% owned or controlled by utilities. To prevent utility ownership contrary to PURPA, FERC looked, at least until this case, to the stream of benefits received by the utility and the utility's control over the QF. Here, CPC set up an affiliated cogeneration facility, MCV, in which it eventually reduced its ownership interest from 90% to a nominal 49%. CPC arranged to be paid $1.2 to $1.5 billion for plant "assets" and to buy MCV's output in the future at special PURPA rates. However, 49% of the remaining profits plus hundreds of millions of dollars worth of benefits from the inflated price of the transferred assets gave CPC more than 50% of the total "stream of benefits" from MCV. In addition, CPC maintained long-term contractual relationships with MCV which, together with the interests of the non-CPC partners with which CPC had contractual relationships, and which deferred to CPC, also gave CPC continuing control over MCV. Thus, FERC's orders violate PURPA's prohibition against utility ownership of QFs.

In considering MCV's certification applications, FERC refused to permit any discovery or development of the factual issues going to utility ownership on grounds that it could rule solely based on the application for qualifying facility status and could ignore contrary evidence. FERC even ignored findings of the MPSC on the decisive issue of utility control, thus refusing to follow decisions of this Court. *University of Tennessee v. Elliott*, 478 U.S. 788 (1986). FERC granted certifications that MCV is a qualifying facility under PURPA without in any meaningful way factually investigating MCV's ownership. In doing so, it ignored state commission findings. The result was to preclude state utility regulation of MCV, based on cost. These actions raise profound issues of federalism and comity. Applied nationally, the result of FERC's decisions will be to thwart effective state regulation on a broad basis, because states are bound by FERC's QF certifications.

If utilities can make windfall profits measured in the billions of dollars by self-dealing with affiliates and buying electricity from them at special PURPA rates, the very concerns that gave rise to utility rate regulation under the Federal Power Act and corresponding state statutes are defeated. Failure of this Court to act to correct FERC's blatant disregard of both PURPA and the Federal Power Act will inevitably lead to a broad deregulation of the electric power industry and reduced competition, both without sanction of Congress and contrary to statute.

I. FERC'S DECISIONS PERMIT UTILITY OWNERSHIP OF QUALIFYING FACILITIES, CONTRARY TO THE PUBLIC UTILITY REGULATORY POLICIES ACT AND THE FEDERAL POWER ACT

a. FERC has certified the MCV facilities as a QF, which exempts them from most utility regulation, even though the facilities are utility owned as defined by PURPA and by FERC's implementing regulations and decisions. PURPA's limitation on ownership of QFs to those persons "not primarily engaged in the generation or sale of electric power," 16 U.S.C. § 796(18)(B)(ii), was a "clear effort to exclude conventional utilities from the QF field." *Puerto Rico*, 848 F.2d at 249. FERC's regulations implementing this prohibition provide that a facility cannot qualify under PURPA if "more than 50 percent of the equity interest in the facility is held by an electric utility or utilities. . . ." 18 C.F.R. § 292.206(b). When examining a QF applicant's compliance with ownership requirements, FERC in the past has protected against improper utility ownership of QFs by looking beyond the applicant's technical ownership interest to the underlying economics of the arrangements, including the underlying corporate structure. *Ultrapower 3*, 27 FERC ¶ 61,094; *Dominion Resources*, 43 FERC at p. 61,251; *Allegheny Elec. Coop.*, 47 FERC at p. 61,055.

FERC in this case effectively ignored whether a utility controls the facilities or whether a utility enjoys more than 50% ownership through the benefit stream. It thus failed to protect against improper utility ownership. When ex-

amined against the statute, FERC's regulations provide an extremely generous test insofar as it permits utility ownership of up to 50% of a QF. Here FERC did not even adhere to the limitations of that test. It ignored hidden profit transfers and refused to acknowledge the control CPC exerts over MCV.

It is axiomatic that FERC must follow its own substantive regulations. *See Columbia Broadcasting Sys., Inc. v. United States*, 316 U.S. 407, 422 (1942); *United States v. Nixon*, 418 U.S. 683, 695-96 (1974) (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-68 (1954)). This is especially true where those regulations are purportedly designed to ensure that statutory standards are met. To the extent FERC's regulations permit up to 50% utility ownership of QFs, despite statutory language that would support, if not mandate, a more restrictive standard, FERC's examination of the actual elements of economic interests and control at least minimally served in the past to prevent utilities from owning QFs in violation of PURPA. However, FERC's decisions here abandoned its ownership test, by taking MCV's application at face value, and by ignoring manifest evidence of utility control. FERC thus effectively deregulated utility QF ownership, contrary to statute and without legislative sanction. FERC's action thus will discourage the development of QFs independent of utilities, contrary to statutory intent, and it permits utilities to enter the QF field as both sellers and buyers. The result is to administratively license utility affiliates to be able to sell power to utilities divorced from rate and other regulation, thereby encouraging serious changes in electric utility corporate and market structures. Such actions are expressly precluded by PURPA and are contrary to the Federal Power Act, and state regulatory statutes.

b. Beyond its nominal 49% ownership share in MCV, CPC will receive additional benefits for a total of more than 50% of the ownership benefits of the project. This violates FERC's stream of benefits test, which FERC de-

signed to measure whether benefits from a QF pushed a utility's actual ownership above 50%, thereby demonstrating utility ownership contrary to PURPA and FERC's regulations. FERC erred in analyzing CPC's share of MCV's profits when it found that, under its own stream of benefits test, MCV met the requirements for QF status under PURPA. (44a-56a) FERC granted certification, even though CPC would get a majority of MCV's profits, which were distributed to CPC, in part, in the form of payments for asset transfers based on future project revenues. In particular, FERC ignored the $1.2 to $1.5 billion in benefits CPC would receive from the sale to MCV of useless nuclear plant facilities, which were worth far less and were probably worthless.[15] According to FERC, because the non-CPC partners of MCV did not object to the amount of the payment to CPC, the payment could not have exceeded what an independent venture would have been willing to pay to obtain equivalent facilities. (52a-56a) FERC found that it was reasonable for the non-CPC partners to "value assets based on the expected revenues that the use of those assets will provide." (56a)

FERC's reliance on the non-CPC investors to determine whether CPC receives more than 50% of the benefits from MCV and therefore under FERC's test "owns" the facility was error.[16] The non-CPC investors had no reason to object to the valuation of the MCV facilities so long as their own investment objectives would still be met. FERC justified its decision based on the fact that the non-

[15] Among the supposed value in the assets was $154 million of remedial soils work for the Midland nuclear plant and $50 million incurred by CPC in a construction completion program for the nuclear reactor. (46a-47a) Michigan questioned but FERC refused to examine the possible uses of these "assets," among others, in a natural gas cogeneration facility.

[16] FERC (in a separate part of its initial order) demonstrates its awareness that a contract favoring a utility affiliate can "tip the equity scales" where a partnership is otherwise structured to provide the utility partner with close to 50% of the stream of benefits. (76a)

CPC partners had exercised their contractual rights to insist that the payment for the Midland facilities would not be so high that it would cause the projected MCV returns to the non-CPC partners to fall below agreed-upon minimum criteria. (52a-56a, 76a-77a, 142a-43a); JA-313. However, FERC erred in equating the non-CPC partners' ability to insist upon a reasonable, even handsome, return on their investment with an ability to insist upon CPC's obtaining no more than 50% of the total benefits from the venture. In essence, the non-CPC partners were merely saying that, so long as their investment objectives were met, CPC could take the remainder of the benefits from the MCV venture by increasing the transfer price for the Midland facilities.[17] Whatever CPC's resulting share of the total benefits, the non-CPC partners had no contractual right (or other reason) to object. Indeed, the only way they could buy into the project was if they did not object.

There is no suggestion in the contracts that the non-CPC partners could or would insist that CPC's share of the venture's profits would not exceed its stated 49% share, *i.e.*, that the payment to CPC for the assets be limited to what it would cost to build or purchase equivalent facilities. Instead, the payment for the assets was inflated to the highest amount that the projected MCV revenues, based on the anticipated special PURPA rates, would sustain, while leaving just enough remaining MCV profits to meet the non-CPC partners' investment criteria.[18] The payment bore no relationship to the cost of

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[17] The allegedly independent investors also had other business relationships with CPC, and possibly side relationships, which FERC refused to investigate. In addition, Dow received the benefits of a litigation settlement by agreeing to the deal. Of course, no owner had an interest in objecting to CPC's willingness to pay excessive rates for MCV's electricity to support the benefits that would accrue to all owners.

[18] The more CPC paid to MCV for the electricity CPC purchases from it, the more CPC would receive from MCV for the transferred plant assets. Specifically, if the price for MCV's electricity in-

obtaining equivalent facilities in an arm's-length transaction. FERC's failure to include a substantial portion, if not all, of MCV's $1.2 to $1.5 billion payment to CPC in the stream of benefits to CPC ignored the economic reality of the MCV arrangements.

In addition to FERC's misplaced reliance on the non-CPC partners "independent" policing of the deal, FERC's analysis of the valuation of the MCV assets subverts the purpose of its own stream of benefits test. Congress and FERC were concerned with and sought to limit, *inter alia*, the ability of a utility to profit through self-dealing with a QF. Here a utility has received compensation for assets "sold" to an affiliated QF, based not upon the independent value of those assets, but upon how much the *utility* will pay itself, as the principal *affiliated owner* of the assets, for the electricity produced. Those payments by CPC to MCV for MCV's electricity output are what FERC terms "the expected revenues that the use of those assets will provide" (56a). But Congress and FERC acted to ensure that in this self-dealing posture, utilities could not own QFs, with FERC defining ownership as receipt of more than 50% of the total benefits.

To evaluate whether the total benefits received by CPC exceed 50%, it is arbitrary, indeed irrational, to exclude the benefit the utility receives from selling assets to the QF affiliate at an inflated price. Administrative Procedure Act, 5 U.S.C. § 706(c)(A) (1988). *See SEC v. Sloan*, 436 U.S. 103, 118 (1978) (deference standard does not permit court to rubber-stamp agencies acting contrary to statute or underlying congressional policy). Under FERC's standard, a utility could sell to a cogeneration affiliate a box of pencils to be used in the plant for $1.2 billion, and FERC would find that the utility re-

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creased from 3.77¢/kwh to 4.15¢/kwh, the payment to CPC for the assets increased by $300 million. (142a-43a) The contracts gave the non-CPC partners no claim for *any* share (much less 51%) of that $300 million, which represents increased profits to MCV that would be diverted 100% to CPC.

ceived no improper benefits, because the transfer was for value (*i.e.*, a mechanism to get higher PURPA rates which, with perfect circularity, would establish the value of the pencils).

The main point is that the *statute* prohibits utilities from owning QF's in recognition that any other rule would encourage profiteering at the expense of the public and would drive independent generation from the marketplace. If in the face of the statute FERC could adopt regulations permitting 50% ownership of a QF, at a minimum FERC is required to apply its stream of benefits test so that the utility's share of the benefits does not, in reality, exceed 50%. Here, FERC ignores the economic reality of the transactions.

c. FERC's other failure in determining MCV's ownership is in its analysis of the extent of CPC's control of the MCV venture. FERC dismissed as irrelevant the fact that CPC had "negotiated" contracts which established most major elements of MCV's long-term (up to 35 years) operations at a time when MCV was 90% owned by CPC subsidiaries. (71a-72a); JA-1532. It considered these contracts irrelevant for two main reasons. First, the Commission asserted that it was typical for cogenerators to set up many of their contracts before beginning production or adding investors, and that any control by CPC prior to June 2, 1989, when MCV began producing electricity, is irrelevant. Second, the MCV Management Committee, on which CPC (through its CMS Midland subsidiary) had only a 49% vote after CPC reduced its nominal ownership interest, could always breach those contracts. (72a)

The first reason does not address the issue of whether the degree of control exerted by these contracts raises CPC's level of control beyond the prohibited level. It merely indicates that, in and of itself, the fact that contracts may exist prior to the addition of investors is not determinative. Where, as here, the contracts pass so many benefits to the utility and effectively strip MCV of control over most major elements of its venture for periods of up

to 35 years (JA-383), FERC was obligated to scrutinize the contracts to determine the extent to which they create continued utility control after electricity is produced.[19] Moreover, here CPC continues its connection with MCV, including as owner, customer, fuel supplier and financier.

FERC's second reason did not deny that these agreements prescribed the relationship on a long-term basis, but held that this "does not mean that the [MCV] management committee cannot opt out of such arrangements. *This might constitute a breach of such an agreement but that is beside the point.*" (72a, emphasis added) FERC's statement ignores both the legal duty to carry out a contract in good faith and the practical consequences of breach. FERC virtually, if not actually, asserts that control cannot be established by contract.[20] The statement of FERC's reasoning is its own refutation.

d. FERC ignored other factual matters and refused to grant discovery, a conference, oral argument or a hearing. This was arbitrary and capricious.[21] Among the matters

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[19] The need to scrutinize contracts is heightened where, as here, the utility does not divest itself completely of its ownership interest under the partnership agreement. Of course, even where there is a technical divestiture, control may remain and bar QF certification. *See Allegheny Elec. Coop.*, 47 FERC at pp. 61,053-55. The case where the utility maintains itself as the largest owner, divesting just enough ownership interest to avoid, assertedly, a technical bar must be distinguished from one where the utility establishes the QF but sells off most of its interests to others who will control the project.

[20] FERC's own regulations, 18 C.F.R. § 46.2 (1993), as well as those of the Securities and Exchange Commission (SEC), 17 C.F.R. § 240.12b-2 (1993), recognize that contracts can establish control.

[21] FERC attempts to justify its narrow approach in reviewing QF applications on the grounds that, under the regulations FERC has promulgated, a QF may also self-certify. 18 C.F.R. § 292.207(a) (1993). (193a-96a) While FERC may have authority to allow self-certification of a QF, FERC may not rely on this authority to abdicate meaningful review where a utility chooses to seek FERC's official approval, presumably because it wants the benefits of a FERC certification to contract, to finance, to support legal argu-

ignored by FERC were service contracts between MCV and its utility owners. (73a-77a) FERC brushed aside MMCG's request to examine the independence of the partners, despite allegations, for example, that Dow had agreed to abandon its independence and agreed to support CPC in regulatory proceedings regarding MCV, and refused to examine the existence of side contracts between CPC (or affiliates) and the other partners (or their affiliates).[22] JA-537-38; JA-1240; JA-1252; JA-1296-97; JA-1315. Under the test FERC had previously articulated, but abandoned here without explanation, if one of the partners had ceded its independence to CPC, this fact could affect FERC's ownership analysis. *See Dominion Resources*, 43 FERC at p. 61,251. Among other issues, FERC also refused to examine the State of Michigan's claim that CMS had guaranteed tax benefits to non-CMS partners in MCV (also going to the issue of ownership and control). (60a) FERC also refused to examine evidence that CPC was using its monopoly power in transmission for MCV's benefit by squeezing out competitors in the generation and distribution of electricity. Eliminating such competition would help to create a market for

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ments to attempt to preempt state authority, or simply to gain the assurance of having FERC certification. Certainly where, as here, certification is contested, FERC may not blind itself to opposing evidence or considerations. Moreover, QFs that do self-certify are subject to subsequent challenge. Ironically, FERC might be hard-pressed to distinguish its MCV precedent on grounds that it was not a self-certification when a future QF, set up like MCV, seeks to retain its QF status.

[22] Even if FERC were correct that its decision was like a declaratory judgment, FERC ignored that when resolving matters of public concern, with far-reaching impacts, a declaratory judgment "should rest on an adequate and full-bodied record." *Public Affairs Assocs. v. Rickover*, 369 U.S. 111, 112-13 (1962). In spite of the often unrefuted evidence submitted by MMCG and the State of Michigan contradicting MCV's representations, FERC still refused to hold a hearing or to look beyond the pleadings. Effectively, it held that neither the factual record nor its consequences are important.

high-priced MCV electricity and to protect the MCV-CPC self-dealing.

FERC also refused MMCG's request for, at minimum, oral argument to balance that CPC had presumably met with FERC or its staff in pre-filing conferences on MCV and other projects, and that one FERC Commissioner had attended the ribbon-cutting ceremony for MCV while certification was pending before FERC on rehearing. JA-1263; JA-1404-06; R. 2165-68. Such improprieties may seriously impair the fairness of the regulatory process. *See WKAT, Inc. v. FCC*, 296 F.2d 375, 382-83 (D.C. Cir.), *cert. denied*, 368 U.S. 841 (1961).

For these reasons, the Court should grant the petition.

II. FERC'S DECISIONS FAIL TO ACCORD PRECLUSIVE EFFECT TO THE DECISIONS OF STATE REGULATORY AGENCIES, CONTRARY TO THIS COURT'S PRECEDENTS, AND IMPEDE THE EFFECTIVENESS OF STATE REGULATION

This case warrants the Court's attention because FERC's decisions improperly undercut state regulation. In analyzing CPC's control of MCV, FERC ignored findings of the MPSC that demonstrated the identity of interest and the self-dealing between CPC and MCV. FERC's decisions recertifying MCV as a QF, despite these findings, created exemptions from state regulation concerning MCV's rates and its financial and organizational arrangements, 18 C.F.R. § 292.602(c), without according respect for the MPSC's findings.

FERC brushed aside MPSC findings that CPC had exercised control over MCV and engaged in self-dealing with MCV, JA-1372; JA-1375-76; JA-1379, which findings were subsequently upheld by the Michigan Court of Appeals. JA-2066-71. FERC's treatment of the MPSC findings were contrary to this Court's decisions in *University of Tennessee v. Elliott*, 478 U.S. 788, 798 (1986), and *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966). Factual findings by another agency—especially the MPSC, which operates as

the state equivalent of FERC, and which is bound in many respects by FERC's decisions regarding MCV's QF status—should have preclusive effect, *id.*, or at least persuasive impact.

FERC improperly disregarded the MPSC's findings on grounds that it need not be bound by them as a general principle and that the MPSC was not specifically addressing the issue of control for purposes of determining QF ownership. (174a-76a) The preclusive effect of factual findings turns not on the exact congruity of legal issues before agencies but on whether "an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate . . ." *Elliott*, 478 U.S. at 797-98 (quoting *Utah Constr.*, 384 U.S. at 422). Although the MPSC may not have specifically addressed the issue of control for purposes of QF certification, in multiple cases before the MPSC dealing with MCV, the MPSC decided issues under its jurisdiction which required factual findings regarding CPC's control of MCV. These matters were properly before the MPSC, were fully considered by that commission and were fully litigated by MCV and CPC. *See, e.g.*, JA-2070. At minimum, the MPSC's opinions constituted evidence that should have been given weight by FERC. Its refusal to do so was error, inconsistent with this Court's decisions in *Elliott* and *Utah Construction*, and independently warrants review because of its implications for federal-state relationships.

FERC's decisions are inconsistent with principles of comity, federalism and judicial economy. At the least, FERC was required to investigate the facts for itself, based upon the findings of the MPSC, or explain why it did not have to, beyond that it did not want to. As matters stand, FERC asserts that it can ignore the MPSC's findings and yet make a decision to which the facts found by the MPSC are crucial. The results are binding on the MPSC in many respects. Perversely, FERC's failure to

consider the matter will likely, if not reversed, control future MPSC decisions.

FERC's decisions also impair the effectiveness of state regulation of utilities. While state commissions, such as the Michigan Public Service Commission, set the avoided cost rates, FERC's QF certifications determine which cogenerators get PURPA rates. FERC's determinations below impair state regulation in at least two ways. First, the utility, as a participant in the QF from which it purchases power, now has incentives to seek as high an avoided cost rate as possible to pay to its affiliated QF. Although a utility would normally share state regulators' desires to keep avoided cost rates down, and has a legal obligation to do so,[23] the utility now has an incentive to impede state efforts to hold down rates. Second, the QF determination made by FERC not only entitles the QF to the avoided cost rate, but also exempts the QF from certain state regulations. 18 C.F.R. § 292.602(c). This state regulation is designed to protect ratepayers by ensuring that rates are just and reasonable. *See* 18 C.F.R. § 292.602(c)(i) (concerning rate regulation) and Mich. Comp. Laws § 460.557 (rates to consumers must be just and reasonable). Where, as here, FERC approves, without appropriate investigation, QF status for utility-owned facilities that would otherwise be subject to regulation, FERC undermines state regulatory efforts to protect ratepayers by removing those utility-owned facilities from cost-based regulation.

Review by this Court is required to repair the injury to state regulation caused by FERC's decisions.

III. FERC'S DECISIONS INCREASE ELECTRICITY COSTS AND WILL TEND TO LESSEN COMPETITION IN THE ELECTRIC POWER INDUSTRY

In addition to being directly contrary to Congress' intent to exclude conventional utilities from the QF field

[23] Rates for purchases of QF power by utilities "shall be just and reasonable to the electric consumers of the electric utility and in the public interest. . . ." 16 U.S.C. § 824a-3(b)(1) (1988).

and impairing state regulation, FERC's decisions will harm consumers of electricity by inviting utilities to shift assets to unregulated affiliatesd that can sell power back to the utilities at non-cost-based rates. Such actions will increase electricity costs and can destroy the pro-competitive, market-oriented trends in the electric power industry.

It has long been established that agency decisions must take into account their consequences. *See, e.g., Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 142-47 (1960). Here, MMCG and Michigan presented evidence that the rate impact of FERC's orders may be billions of dollars in this single instance over the course of the MCV contract, and that those orders are destructive of both regulation and competition. They estimated that the difference between the rates Michigan ratepayers would pay under cost-based regulation, to which MCV would be subject were it not granted QF status, and the rates they presumably must ultimately pay to cover CPC's special PURPA rate payments to MCV, which MCV receives as an unregulated and FERC-certified QF, could be on the order of $4 billion. JA-1920-73. Replicated across the nation, the negative economic impacts would be severe. The availability of such profits will allow and attract other utilities to establish similar sham QFs to avoid regulation, and it will spawn the kind of "milking" of utilities by holding companies that gave rise to regulation.

Consumers of electricity are injured by this utility involvement in QFs, because of the upward pressure it puts on rates to increase the profitability of the utility's affiliated generator. Consumer protection is furthered by the entry of new, independent entities into the generation market. By encouraging utilities to own QFs, from which utilities are required to purchase power, FERC's decisions undercut these protections by creating incentives for utilities to overpay for QF power and not to police the electricity rates to ensure that they do not surpass true "avoided costs". FERC's decisions also discourage utilities, which often have monopoly retail service areas, from purchasing

from independent generation market participants, thereby threatening their existence.

It is no mere speculation that utilities will succumb to the incentive to buy power from their affiliates at excessive rates. In Michigan, CPC has been in the strange position, as purchaser of MCV power, of arguing for *higher* avoided cost rates for MCV power than the MPSC has ordered. *See, e.g., Consumers Power Co. v. PSC,* 196 Mich. App. 436, 493 N.W.2d 902 (1992); *Consumers Power Co. v. PSC,* 189 Mich. App. 151, 472 N.W.2d 77 (1991), *leave denied,* 439 Mich. 922, 477 N.W.2d 644 (1992). With the MCV precedent set by FERC, other utilities nationwide may replicate the MCV transaction.

Such an outcome not only conflicts with PURPA but also conflicts with the other purposes of the Federal Power Act, of which PURPA is a part. Among the goals of Congress in enacting the Federal Power Act were: the protection of ratepayers from excessive rates and charges, *Atlantic Refining Co. v. Pub. Serv. Comm'n,* 360 U.S. 378, 388 (1959) (under Natural Gas Act, which is to be construed *in pari materia* with the Federal Power Act); the prevention of abusive, anticompetitive practices by public utilities; and the need for effective regulation of these utilities. *Gulf States,* 411 U.S. at 758-59. FERC's decisions do not comport with these statutory goals, because they harm consumers by making them pay billions of dollars in excessive rates as a result of over-priced power sales from MCV to its affiliate, CPC. This Court has found repeatedly that in performing their tasks, regulatory agencies are required to consider the requirements of related statutes. *Southern Steamship Co. v. NLRB,* 316 U.S. 31 (1942); *Gulf States Utils. Co. v. FPC,* 411 U.S. 747. Here, FERC applied PURPA without even considing the implications for regulation under the Federal Power Act of which PURPA is a part.

FERC's decisions will affect the structure and direction of the electric power industry. There is great and focussed interest in the potential for *increased* competition in the electric power industry. *See* Title VII, Energy Policy Act,

Pub. L. No. 102-486, 106 Stat. 2776 (1992).[24] However, MCV's PURPA recertification provides incentives for CPC to use its monopoly power to distort or destroy the competitive market for electricity in Michigan. *E.g.*, JA-586-91; *see also* JA-2029-2064. Neither PURPA's goal of QF development, *Mississippi*, 456 U.S. at 750-51, nor the pro-competitive goals of the Federal Power Act, as amended by the Energy Policy Act, are served by FERC's decisions, because they permit utilities such as CPC to engage in anticompetitive behavior by favoring their own affiliated QFs over independent sources. The MCV decisions show that the incentive for self-dealing is so great that generation competition will actually be eliminated or dramatically reduced, contrary to the current direction of increasing competition. Indeed, the MPSC found that CPC's preference for MCV had actually led to the reduction of generation alternatives in Michigan.

> As a consequence of Consumers' actions, all, or almost all, of the capacity needed through 1997 will be provided by a project in which Consumers has a substantial ownership interest; all, or almost all, of the capacity will be fueled by natural gas; all, or almost all, of the capacity will be provided by a single, large generating facility; and a variety of small projects using diverse fuels will have little chance to develop in the next five to ten years in Consumers' service territory.

Midland Cogeneration Venture Ltd. Partnership, Nos. U-8871 *et al.*, 1989 Mich. PSC LEXIS 274 at *8 (Mich. PSC Sept. 26, 1989) (quoted at R. 657-58).

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[24] "[T]he adequacy and reliability of electricity are integral to the nation's economic well-being. Concern about the adequacy of planned future generation, evidence of the success of independent power production as a result of the Public Utility Regulatory Policies Act of 1978 (PURPA), and concern about obstacles to competition by the Public Utility Holding Company Act (PUHCA) and monopolistic control of transmission lines, led the Committee to foster increased competition in the generation of power and increased openness in its wholesale transmission." H.R. Rep. No. 474, 102d Cong., 2d Sess., pt. 1, at 133 (1992).

In addition to lessening competition in generation markets, the incentive to favor affiliated generation can spill over into other areas where utilities possess monopolies. As MMCG has alleged, CPC has sought acquisitions of competing utilities, including members of MMCG, and has sought to use its transmission monopoly to both expand and protect markets for excessively priced MCV power. JA-586-91; JA-2029-64. The incentive to deny or restrict transmission access for QFs and other independent generators, is contrary to the pro-competitive and pro-development purposes of the Federal Power Act and PURPA.

Finally, the Federal Power Act, to which PURPA is an amendment, is designed to protect against an industry structure where large privately owned utility companies often exercise monopoly power over the generation, transmission and distribution of electricity. *Gulf States*, 411 U.S. at 759 (citing Summary Report of the Federal Trade Commission, S. Doc. 92, 70th Cong., 1st Sess., pt. 73-A, at 52 (1935)). At the time of the passage of the Act, complicated corporate structures in the industry further limited competition, giving rise to the need for regulation. *Gulf States*, 411 U.S. at 758; *SEC v. New England Elec. Sys.*, 384 U.S. 176, 180-83 (1966); *North American Co. v. SEC*, 327 U.S. 686, 706 (1946). Here, a utility and its holding company have used risky financial manipulation,[25] self-dealing and a myriad of affiliate transactions to

[25] The MCV arrangements are like those which the Federal Power Act and the companion Public Utility Holding Company Act were meant to prevent, *id.*, and which the prohibition against utility ownership in PURPA, if enforced, would have prohibited. Under these arrangements, affiliates would use revenues from utility sales to support inflated asset values. As alleged by MMCG and Michigan, the transactions here were similar, and leaving FERC's orders undisturbed will encourage such transactions. The MCV financing was a creation of Drexel Burnham Lambert, a firm closely associated with debt financing, supported by anticipated revenues from future sales. Whatever the merits of this type of transaction in non-regulated industries, its application in the utility industry cannot be countenanced where it relies on above-cost rates and the avoidance of regulation to support the revenue stream.

evade regulation and obtain excessive profits. Such activities are credited with contributing to the stock market crash in 1929 and the ensuing passage of the Public Utility Holding Company Act. *See* Douglas W. Hawes, *Utility Holding Companies*, §§ 2.04-2.05 (1987). Excessive electricity rates can have severe adverse impacts not only on households but also on industries. This is especially true for Michigan's heavy industrial base, which is subject to increasingly fierce national and international competition. FERC's decisions ignore these considerations.

CONCLUSION

For the reasons stated herein, the Court should grant the petition for certiorari.

Respectfully submitted,

FRANK J. KELLEY
Attorney General
State of Michigan

THOMAS L. CASEY
Solicitor General
State of Michigan

LUIS F. FERNANDEZ
Assistant Attorney General in Charge

LARRY F. BRYA
Assistant Attorney General

Special Litigation Division
630 Law Building
P.O. Box 30212
Lansing, MI 48909
(517) 373-1123
Counsel for the State of Michigan

ROBERT A. JABLON *
THOMAS C. TRAUGER
MARK S. HEGEDUS

SPIEGEL & MCDIARMID
1350 New York Avenue, N.W.
Suite 1100
Washington, D.C. 20005-4798
(202) 879-4000
Counsel for Michigan Municipal Cooperative Group

August 31, 1993

* Counsel of Record

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-1366

MICHIGAN MUNICIPAL COOPERATIVE GROUP, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

Appeal from the
Federal Energy Regulatory Commission

BEFORE: EDWARDS, SENTELLE, and HENDERSON, *Circuit Judges*

JUDGMENT

[Filed Mar. 26. 1993]

This cause came to be heard on petition for review of orders of the Federal Energy Regulatory Commission ("FERC") in *CMS Midland, Inc., Midland Cogeneration Venture, L.P.*: "Order on Applicaiton for Recertification as a Qualifying Cogeneration Facility, Request for Waiver and Petition for Revocation," 50 FERC ¶ 61,098 (January 31, 1990); "Order Granting Application for Recertification as a Qualifying Cogeneration Facility," 50 FERC ¶ 61,259 (March 1, 1990); "Order Denying Request for Rehearing, Rejecting Supplemental Filings and

Denying Motion for Stay," 56 FERC ¶ 62,177 (July 31, 1991); and "Order Denying Requests for Rehearing and Rejecting Supplemental Filings," 50 FERC ¶ 61,361 (September 11, 1991). The court has determined that the issues presented occasion no need for a published opinion. *See*: D.C. Cir. Rule 14(c). For the reasons set forth in FERC's opinions in this case, it is

ORDERED and ADJUDGED by this court the petition for review is denied, and the orders of FERC are affirmed, substantially for the reasons stated therein.

It is FURTHER ORDERED, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15(b)(2).

Per Curiam
For the Court

/s/ Ron Garvin
RON GARVIN
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-1366

MICHIGAN MUNICIPAL COOPERATIVE GROUP, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

BEFORE: EDWARDS, SENTELLE, and HENDERSON, *Circuit Judges*

ORDER

[Filed June 02, 1993]

Upon consideration of the petitions for rehearing of the Michigan Municipal Cooperative Group and the State of Michigan, it is

ORDERED, by the Court, that the petitions are denied.

Per Curiam
FOR THE COURT:
RON GARVIN, Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-1366

MICHIGAN MUNICIPAL COOPERATIVE GROUP, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

Before: MIKVA, *Chief Judge*; WALD, EDWARDS, RUTH B. GINSBURG, SILBERMAN, BUCKLEY, WILLIAMS, D. H. GINSBURG, SENTELLE, HENDERSON, and RANDOLPH, *Circuit Judges*

ORDER

[Filed June 2, 1993]

The Suggestions For Rehearing *En Banc* on the Michigan Municipal Cooperative Group and the State of Michigan, have been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestions are denied.

Per Curiam
FOR THE COURT:
RON GARVIN, Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

DOCKET NO. QF87-237-000

CMS MIDLAND, INC.

DOCKET NO. QF87-237-001

MIDLAND COGENERATION VENTURE, L.P.

ORDER ON APPLICATION FOR
RECERTIFICATION AS A QUALIFYING
COGENERATION FACILITY,
REQUEST FOR WAIVER, AND PETITION
FOR REVOCATION

(Issued January 31, 1990)

Before Commissioners: Martin L. Allday, Chairman; Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.

On November 2, 1989, as supplemented on December 1, 1989, Midland Cogeneration Venture, L.P. (MCV or Applicant) submitted for filing an application for recertification, as a qualifying cogeneration facility, of a topping cycle facility located in Midland, Michigan. On November 7, 1989, as supplemented on November 8, 1989, the

Applicant submitted for filing, as an accompaniment to the application, a petition for temporary waiver of the operating and efficiency standards for qualifying cogeneration facilities contained in section 292.205 of the Commission's regulations.[1]

Notice of the application and request for waiver was published in the *Federal Register*, with comments, protests or motions to intervene due on or before November 28, 1989.[2] On that date three parties moved to intervene: (1) the Michigan Public Service Commission filed a notice of intervention; (2) the Michigan Attorney General, on behalf of the State of Michigan (Michigan or the State) filed three pleadings collectively moving to intervene, requesting an evidentiary hearing, opposing the application for recertification, and answering the petition for waiver;[3] and (3) the Michigan Municipal Cooperative Group (the Michigan Municipals)[4] filed a protest, motion

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[1] 18 C.F.R. § 292.205 (1989).

[2] 54 Fed. Reg. 47,710 (1989).

[3] The three pleadings are titled, respectively, (1) Motion For Intervention and Request For Evidentiary Hearing; (2) Brief In Support Of Motion For Intervention, Request For Evidentiary Hearing and in Opposition to the MCV's Request for Recertification; and (3) Answer To The Midland Cogeneration Venture Limited Partnership's Petition For Temporary Waiver of Operating An [sic] Efficiency Standard.

[4] For purposes of this intervention, protest and request for hearing, the Michigan Municipals state that they consist of virtually all of the publicly owned municipal and cooperative electric systems in Michigan's lower peninsula. Specifically, intervention is requested by the Michigan Ratepayers Group, which includes the City of Bay City, the City of Carlevoix, the Village of Chelsea, the City of Eaton Rapids, the City of Harbor Springs, the City of Hart, the City of Lowell, the City of Petoskey, the City of Portland, the City of Saint Louis, the Southeastern Michigan Rural Electric Cooperative, Inc., and the Wolverine Power Supply Cooperative, Inc.; the Michigan South Central Power Agency (MSCPA) on behalf of itself and its members; the Michigan Public Power Agency (MPPA) on behalf of itself and its members; the Michigan Municipal Electric

to intervene and request for hearing. On December 6, 1989, MCV filed an answer to the State of Michigan's motion to intervene and request for evidentiary hearing. On December 13, 1989, MCV filed an answer to the Michigan Municipals' motion to intervene and request for evidentiary hearing. Subsequently, on December 22, 1989, the Michigan Municipals filed a supplemental amendment to their motion to intervene.

On January 8, 1990, MCV filed two additional pleadings: (1) an answer to the Michigan Municipals' supplemental amendment to motion to intervene; and (2) a motion for expedited treatment. Additionally, on that same date, the State of Michigan also filed two pleadings: (1) a supplemental brief in support of its motion to intervene and request for evidentiary hearing; and (2) in Docket No. QF87-237-000, a motion for intervention and declaratory relief, or alternatively for reconsideration. These pleadings were followed on January 12, 1990, by the filing of the Michigan Municipals' answer to the motion for expedited treatment. A brief in opposition to the motion for expedited treatment was filed by the State on January 16, 1990. Thereafter, on January 18, 1990, MCV filed two additional pleadings: (1) an answer to the State of Michigan's supplemental brief; and (2) an answer to the State's motion for intervention and declaratory relief or for reconsideration, filed in Docket No. QF87-237-000.

Background

The Originally Proposed Facility

The Midland facility has previously been certified in Docket No. QF87-237-000. *CMS Midland Inc.*, 38 FERC ¶ 61,244 (1987). In terms of facility ownership,

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Association (MMEA) on behalf of itself and its members; the Wolverine Power Supply Cooperative, Inc.; and in addition, the Lansing Board of Water & Light, the Cities of Saint Louis, Charlevoix, Holland and Portland.

the prior certification was premised upon the applicant's representation that, at any time on or after the facility's initial operation date,[5] the equity interest in the facility held by an electric utility would not exceed 49%. *Id.* at pp. 61,827-829.[6] With regard to facility design, the certification approved two possible facility configurations. The dual-option facility configuration stemmed from the fact that the proposed Midland facility would use some of the equipment from the cancelled nuclear generation plant of CMS Midland's parent, Consumers Power.[7] In one configuration, termed the Partial Conversion Alternative (PCA), the facility was to consist of eight combustion turbine-generators, eight heat recovery steam generators (HRSGs) and an extraction/condensing turbine generator, and would have a total net electric power production capacity of 865.8 MW. The other configuration, termed the Complete Conversion Alternative (CCA), was to consist of twelve combustion turbine-generators, twelve HRSGs and the extraction/condensing turbine generator and would have a total net electric power production capacity of 1343.2 MW. *Id.* at p. 61,826. Under either alternative, exhaust heat recovered from each combustion

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[5] The date on which electricity from the facility is delivered to any power grid. 38 FERC at p. 61,827.

[6] The applicant at that time was CMS Midland, Inc. (CMS Midland), a wholly owned subsidiary of Consumers Power Company (Consumers Power). CMS Midland represented that the owner of the facility would be a Michigan limited partnership consisting of CMS Midland and two other wholly owned Consumers Power subsidiaries as general partners, Rofan Energy Inc. (Rofan), a wholly owned subsidiary of Dow Chemical Company (Dow), as a limited partner and other equity investors (as general and/or limited partners) whose identities had not yet been determined. The partnership that was formed, on January 27, 1987 (and which has been modified since then as the result of changes in membership, *infra* p. 5) is MCV.

[7] The proposed two-unit nuclear plant was cancelled in 1984 when construction was 85% complete. *CMS Midland Inc.*, 38 FERC at p. 61,829 n. 2.

turbine-generator would be directed to an HRSG with a portion of the high pressure steam generated therein (900 psig) used in the extraction condensing turbine-generator to generate additional electric power, and the balance, together with low pressure steam from the HRSGs, being delivered to Dow for use in chemical manufacturing processes and space heating. Consumers Power and Dow would both purchase electricity from the facility. *Id.*

The Currently Proposed Facility

The recertification is requested to reflect technical changes in the configuration of the facility as built, changes in the provisions of the MCV Limited Partnership Agreement (the partnership agreement) and changes in provisions of agreements providing for the transfer of assets to the partnership. The configuration actually built is that consisting of twelve turbine-generators (with approximate electrical output of 87.6 MW each), twelve HRSGs (six of which are capable of supplementary firing), and two steam turbine-generators. The change from the originally certified Complete Conversion Alternative is the addition of one steam turbine-generator to serve as a backup when the primary steam turbine is not available for use. According to MCV, the back-up steam turbine-generator is the Unit 2 steam turbine-generator from the cancelled Midland nuclear plant, modified to accept the steam flow from the twelve HRSGs. MCV also explains that the two steam turbine-generators cannot generate electric power simultaneously, so only one will be in service at any time. In addition, MCV indicates that the modified Unit 2 steam turbine-generator is used as a back-up and is not expected to operate more than 10% of the time. As a result, MCV states, the Unit 2 steam turbine-generator design has not been optimized fully and its electric output is less than that of the primary turbine-generator. However, MCV avers and has presented calculations to demonstrate, that even in a worst case (i.e., the Unit 2 steam turbine-generator is used full time on

an annual basis), the facility will comply with the operating and efficiency standards for qualifying cogeneration facilities set forth in section 292.205 of the Commission's regulations.[8]

The Applicant also points out that in order to economically reduce the pressure of a portion of the process steam, Dow also uses a back-pressure turbine but that process steam is not used for any mechanical drives other than those used for pressure reduction (from 190 psia to 43 psia) of process steam.[9] In that regard, in calculating useful thermal energy output for purposes of the operating and efficiency standard calculations, the useful thermal output of the steam exiting the Dow turbine is added to the useful thermal energy of the 190 psia process steam from the MCV facility which goes directly to thermal use, with the useful thermal energy of the MCV 190 psia steam measured at the point at which the steam is transferred into the Dow process steam system.[10] Further, in calculating the useful power output for purposes of these calculations, MCV adds the useful power output of the Dow back-pressure turbine (estimated at approximately 6.2 MW) to the useful power output of the MCV facility. However, MCV points out that it is not seeking qualifying status for the Dow-owned back-pressure turbine.[11]

As originally formed, MCV consisted of three general partners: CMS Midland and two other wholly owned Consumers Power subsidiaries, Tempco I and Tempco II; and one limited partner, Rofan. The original certification was granted by the Commission with the understanding that other equity investors would be added as general or limited partners, that Tempco I and Tempco II were general partners only to facilitate the transfer of partnership

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[8] MCV Application at 7.

[9] *Id.* at 5.

[10] *Id.* at 8.

[11] *Id.*

interests to other equity investors and that, effective any time on or after the initial operation date, the equity interest in the facility held by an electric utility, electric utility holding company or any combination thereof would not exceed 49%. 38 FERC at p. 61,827.[12] On June 13, 1988, the partnership agreement was amended and restated pursuant an Amended and Restated Partnership Agreement to provide for the admission of five new partners (the New Partners)[13] and the withdrawal of Tempco I and Tempco II. MCV has represented that none of the New Partners is an electric utility.[14] Under the Amended and Restated Partnership Agreement subsidiaries of Consumers Power were still entitled to more than 50% of the economic benefits of the partnership.[15]

The Amended and Restated Partnership Agreement was amended on May 26, 1989 (Amendment No. 1) to adjust partnership allocations and in particular, to reduce CMS Midland's allocations of partnership benefits to less than 50%. However, MCV requests recertification of qualifying status for the facility only for the period fol-

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[12] The original application spoke in terms of the partnership that would be formed and referred to the yet-to-be executed MCV Limited Partnership Agreement. In fact, the MCV partnership agreement among these four partners was executed January 27, 1987, four days subsequent to the filing of the initial application. However, as noted, certification was sought and granted based upon the form the partnership would take by the initial operation date since all investors in the project had not been identified at the time of the application.

[13] The new general partners and the parent corporations with which they are affiliated are: (1) Micogen Limited Partnership (Micogen), the Fluor Corporation; (2) MEI Limited Partnership (MEI), ASES Brown Boveri, Inc.; (3) Source Midland Limited Partnership (Source), Panhandle Eastern Corporation; and (4) Coastal Midland Inc., (Coastal), the Coastal Corporation. C-E Midland Energy, Inc., (C-E), a Combustion Engineering Corporation subsidiary, is the new limited partner.

[14] MCV Application at 33.

[15] *Id.* at 21.

lowing the date (Closing Date) in 1990 that the "Net Project" [16] is transferred to the partnership by MEC Development Corporation (MDC),[17] as more fully described below, to coincide with the expected funding by the New Partners of their remaining equity commitments.

According to MCV, the Amended and Restated Partnership Agreement [18] prescribes allocation of all profits and losses as well as cash distributions of the partnership in accordance with specific sharing percentages for all non-CMS Partners and CMS Midland's share being the remainder, subject to a 49% limitation.[19] Further, the partnership agreement provides that upon liquidation of the partnership and after the satisfaction of other partnership debts, all remaining partnership assets will be distributed in accordance with the relative positive capital account balances of the partners. In addition, all partners, other than Rofan, have agreed upon liquidation to make up any negative balance of their capital account to the extent necessary to retire positive capital accounts owed to other partners.

The partnership agreement also sets forth specific allocations of tax depreciation for the partners.[20] In that re-

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[16] The Net Project consists of certain non-cash assets consisting of plant and equipment located at the site prior to conversion.

[17] MDC is a wholly owned subsidiary of Consumers Power, as is CMS Midland.

[18] Unless otherwise indicated, the Amended and Restated Partnership Agreement including any changes prescribed by Amendment No. 1, is hereinafter referred to as the partnership agreement.

[19] These sharing percentages for all but CMS Midland are: Micogen, 4.53%; MEI, 9.063%; Source, 18.125%; Coastal, 10.875%; and C-E, .906%. Rofan's share is determined pursuant to a formula and may change from time to time during the term of the partnership. Amended and Restated Limited Partnership §§ 4.1-4.2; Amendment No. 1 §§ 1.1-1.2.

[20] The percentages are: Micogen, 4.728%; MEI, 9.456%; Source, 18.912%; Coastal, 11.347%; and C-E, .945%. Rofan's share is

gard, the agreement provides, similar to the above-described allocations, that the allocation to CMS Midland of tax depreciation will be the remainder, but in this instance the allocation may not exceed 49.9%.

Under certain circumstances, allocations to CMS Midland of depreciation for partnership book accounting purposes may exceed 50%. However, MCV states that this does not affect the benefits to be derived from the facility as the only effect of an allocation to a partner of book depreciation is to cause a reduction in that partner's capital account which, in turn, results in a partner receiving less value upon liquidation of the partnership or, if such partner's capital account is below zero at liquidation, that partner (other than Rofan) may be required to make up an increased negative balance in its capital account. Therefore, MCV avers, the allocation of book depreciation should not be viewed as a component of the "stream of benefits." [21]

MCV next explains that CMS Midland does not and will not have more than 50% control of the partnership. The general partners are to manage the business and affairs of the partnership through a management committee. Pursuant to Article V of the partnership agreement, MCV points out that CMS Midland's vote on the management committee is limited to 49% of the total voting power at *any* meeting of the management committee.[22] MCV also notes that the partnership has determined to operate the facility itself rather than to enter into an operating agreement with a third party. In that connection, it points out that neither Consumers Power nor any

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determined pursuant to a formula and may change from year to year.

[21] *See Ultrapower 3*, 27 FERC ¶ 61,094 (1984); *CMS Midland Inc.*, 38 FERC ¶ 61,244 (1987).

[22] MCV Application at 34 (emphasis supplied).

affiliate of Consumers Power operates the facility or will operate the facility at any time in the future.[23]

The other change from the original application involves the funding of the partnership and transfer of the Net Project. In January 1987, CMS Midland initially contributed to the capital of the partnership non-cash assets with a value of approximately $134 million at the time of transfer. 38 FERC at p. 61,828. This amount has been credited to CMS Midland's capital account.[24] Since then, Rofan has contributed to the capital of the partnership approximately $115 million in cash which has been credited to its capital account. Prior to the date on which the facility will be placed in commercial operation (In-Service Date), which will also be the date on which the facility is to be placed in service for federal tax purposes, CMS Midland will contribute additional capital in the form of non-cash assets (with a value of approximately $207 million) consisting of plant and equipment which already exist at the facility site.[25]

The five New Partners admitted to the partnership on June 13, 1988, have contributed to the capital of the partnership an aggregate of $24 million in cash which has been credited to their respective capital accounts. Subject to certain conditions, these partners are obligated to contribute an additional $216 million in cash prior to the In-Service Date, bringing the cumulative aggregate capital contributions of all the partners as of that date to $696 million.[26]

The Net Project will be transferred to the partnership by MDC or Consumers Power prior to the In-Service Date pursuant to the terms of the MDC Transfer Agree-

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[23] *Id.*

[24] *Id.* at 28.

[25] *Id.*

[26] *Id.* at 28-29.

ment.[27] Under the terms of the original MDC Transfer Agreement, executed January 27, 1987, the Net Project was to have been transferred for an amount equal to the March 31, 1986 book value of the assets to be transferred (approximately $1.5 billion) plus an amount accrued representing a time-value adjustment factor (Original Transfer Price).[28] However, as a condition to their agreement to join the partnership, the New Partners required that the original MDC Transfer Agreement be amended to limit the consideration paid by the partnership to notes (MDC Notes) in an amount equal to the *lesser* of the Original Transfer Price or an amount which, based upon projections to be agreed upon by the partnership (without the participation of CMS Midland) and MDC prior to the In-Service Date, would permit the partnership to achieve a projected 1.1 total debt coverage ratio for each year and would permit each of the New Partners to achieve a projected internal rate of return of not less than 16%. This is documented in the Amended and Restated MDC Transfer Agreement, dated June 9, 1988.[29] Failing agreement, the projections, and therefore the amount of MDC Notes, would be determined through arbitration. Additionally, the partnership agreement prohibits CMS Midland's representative on the management committee from participating in any vote by the management committee with respect to the determination of the amount of MDC Notes to be issued under the Amended and Restated MDC Transfer Agreement.[30]

In August 1989, the non-CMS Partners and MDC reached agreement as to the amount of MDC Notes to be

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[27] MCV points out that, pursuant to section 2(a) of the Amended and Restated MDC Transfer Agreement, MDC or Consumers Power, as the case may be, is obligated to transfer the Net Project.

[28] Book values are expressed with reference to 1986 because this was the last year for which book values had been determined as of the time of the original agreement.

[29] MCV Application at 30-31.

[30] *Id.*

issued. Under that agreement, documented in a Memorandum of Agreement with Respect to Amended and Restated Transfer Agreement dated September 27, 1989 (Memorandum of Agreement), MDC is entitled to approximately $1.2 billion in notes as consideration for the transfer of the Net Project subject to downward adjustment if: (1) a test of the gas turbines and heat recovery units indicates that the performance or efficiency of this equipment is below agreed-upon standards; or (2) a reduction in the average capacity rate payable under the Power Purchase Agreement below an average of 3.77 cents per kWh is compelled pursuant to a valid "final rate order" of the Michigan Public Service Commission. The amount of MDC Notes is adjustable upward if: (1) MDC enters into an additional power sales agreement meeting certain criteria prior to December 1, 1989; or (2) the Michigan Public Service Commission approves an average capacity rate under the Power Purchase Agreement that exceeds 3.77 cents per kWh.[31]

According to MCV, the effect of these limitations on the MDC Notes is to limit the consideration that MDC would receive for the Net Project to an amount that, in any event, will not exceed the Original Transfer Price based on book value. In that regard, MCV states that the methodology for determining any adjustment was determined without the participation of CMS Midland and by arm's-length negotiation.

The Petition for Waiver

MCV seeks waiver of the operating and efficiency standards for calendar year 1989. According to MCV, during that period the facility was not in commercial operation but certain components were operated for testing purposes only. Specifically, MCV states that on June 2, 1989, the

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[31] *Id.* at 32. An adjustment (either up or down) would also be made if the transfer of the Net Project occurs on a date other than January 5, 1990, to compensate for the time-value of money. *Id.*

facility did supply power to a power grid, and that date is therefore the initial operation date.[32] As a result, MCV contends the initial certification became effective by its terms on that date.[33]

According to MCV, following the initial grant of certification it was determined that the facility would not meet the Commission's operating and efficiency standards during the testing period following the initial operation date because the first eight gas turbines and heat recovery units, together with the primary steam turbine, function as an integrated facility, and reliable steam could not be supplied to Dow while testing the individual components of this integrated facility during 1989. At the time of filing the petition, MCV stated that the total amount of power to be supplied by the facility to a power grid during 1989 was not expected to exceed 490 million kWh, which represents less than 15 days of output of the facility at full production during commercial operation. Under its power purchase agreement with Consumers Power, the partnership has been recovering 2.03 cents per kWh for test power, which is the rate agreed upon by the parties to approximate the cost of gas consumed by the facility in the production of test power. MCV also notes that the partnership has received a private letter ruling from the Internal Revenue Service that the first eight gas turbines and heat recovery units, together with the primary steam turbine, constitute an integrated facility which will not be deemed to be "placed in service" for tax purposes until the date on which all of these components have been tested and are ready for operation.[34]

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[32] That is, the date CMS Midland proposed, and the Commission accepted, as the point in time when the facility ownership and design configuration(s) would conform to the requirements of the Commission's regulations. 38 FERC at p. 61,828.

[33] MCV Petition at 2.

[34] *Id.* at 2-3.

MCV makes two arguments in support of the request for waiver: (1) like the Commission's decision in *Nelson Industrial Steam Company*,[35] which was based on specific facts that were unique to the case, the matter at hand presents equally compelling reasons for a temporary waiver of the Commission's standards; and (2) the facility will produce significant energy savings, required by section 292.205(c) of the Commission's regulations as a condition precedent to a grant of a waiver.[36] With regard to the latter, MCV states that the facility is a topping cycle cogeneration facility utilizing 12 combustion turbines operating on the Brayton cycle, with the exhaust of each turbine ducted directly to HRSGs, the combined steam output of which is piped to a single steam turbine operation on the Rankine cycle where additional electric energy is produced and steam for process use is extracted. Due to the sequential use of thermal energy first in the Brayton cycle, and then the Rankine cycle, MCV states that the combined cycle facility is inherently more efficient than a conventional power plant. According to MCV, as a cogeneration facility, the facility's use of energy to twice generate electric energy (via the combustion turbines, and then the steam turbine) before being put to thermal use (as process steam) results in high plant efficiency.[37]

MCV also states that the Midland facility has unique design features which enhance plant efficiency, including provision of a backup steam turbine which allows the facility to provide a continuous source of electric and thermal energy at high efficiency, even when the primary steam turbine is not available.[38] In addition, the Applicant contends that the facility's configuration of 12 combustion turbines and HRSGs supplying a steam turbine

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[35] 39 FERC ¶ 61,201 (1987).

[36] 18 C.F.R. § 292.205(c) (1989).

[37] MCV Petition at 7.

[38] *Id.*

results in high efficiency at less than full plant output because a lesser number of combustion turbines can be operated at or near their most efficient point, which is at their rated capacity. In fact, referring to the calculations supplied with the application, MCV points out that the facility will operate at an efficiency standard of 47.1% (or 45.6%, assuming, on a worst case basis, full-time operation of the back-up steam turbine). MCV avers that this represents the type of significant energy savings that were intended to be encouraged by the Public Utility Regulatory Policies Act of 1978 (PURPA).[39] Finally, MCV states that the facility will meet or exceed the standards of section 292.205(a) of the Commission's regulations once commercial operations have begun, and no further waivers of the Commission's standards will be needed.[40]

Pointing out that the Commission in the *Nelson* case granted a waiver pursuant to its general equitable powers, MCV contends that similar action here would be appropriate. To that end, MCV states first that the facility will bring about the economically productive utilization (as opposed to waste) of existing assets valued at approximately $1.5 billion.[41] Further, MCV states that: (1) construction and operation (for testing purposes) during the waiver period is providing employment for approximately 1,000 persons in the Midland area; and (2) approximately 120 persons in the Midland area are expected to be employed directly by the partnership during commercial operation of the facility.[42]

MCV also draws another parallel to the *Nelson* case, arguing that in both instances PURPA has provided the incentive to convert an existing facility into an energy-

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[39] 16 U.S.C. § 2601 *et seq.* (1988).

[40] MCV Petition at 7-8.

[41] *Id.* at 4-5.

[42] *Id.* at 5.

efficient cogeneration facility and that, as in *Nelson*, denial of the request for waiver "would frustrate PURPA's goal of encouraging cogeneration." [43] However, MCV emphasizes that unlike *Nelson*, where a five-year waiver was sought and granted, MCV is only asking the Commission to waive its standards during a calendar year in which electricity will be produced only through the testing of certain components of the facility. In that connection, MCV notes that the five-year waiver period in *Nelson* included an eleven-month contingency period for possible rebidding on plant and equipment, environmental approvals, possible difficulty in securing commercial test burns on petroleum coke, and possible design corrections discovered during start-up, and that the Commission characterized this eleven-month start-up, or contingency period, as "reasonable." [44]

MCV also asserts that the facility will in fact comply with the Commission's operating and efficiency standards for the twelve-month period beginning on the initial operation date. It emphasizes that the petition is necessary only because of special circumstances, i.e., commencement of testing in 1989, with commercial operation beginning in a subsequent calendar year (1990), making it impossible for the facility to comply with the operating and efficiency standards for calendar year 1989.

The Protests and Requests for Hearing

In its brief opposing the MCV application for recertification, the State of Michigan contends generally that: (1) the MCV partnership does not meet the requirements of section 292.206 of the Commission's regulations because the equity interest of CMS Midland—as an affiliate of CMS Energy Corporation (CMS), an electric utility holding company—exceeds 50%; (2) transactions between Consumers Power and MCV have already been found by the Michigan Public Service Com-

[43] *Id.* at 6, *citing* 39 FERC at p. 61,724.

[44] *Id.*

mission (Michigan Commission) not to be at arm's length; and (3) given an alleged invalidity of previous representatives made by CMS and MCV to the Michigan Commission, careful scrutiny should be applied to the operational standards of the MCV facility and an evidentiary hearing held. Charging that MCV has been established to benefit CMS through "self-dealing and contractual opportunism," [45] the State argues that these benefits will be detrimental to the remaining MCV partners and Michigan ratepayers. The State further alleges that certification of the MCV facility will impede the development of competitive cogeneration and small power production facilities which were envisioned under PURPA.

With respect to ownership of the facility, the State makes three principal arguments (described in detail *infra,* as are the balance of the intervenors' arguments): (1) the MDC Notes are equity rather than debt, raising CMS's share of MCV equity above 50%; (2) CMS exerts control over MCV; and (3) CMS is exposed to more than 50% of the risk of loss in MCV. In terms of the Commission's stated concern with contractual dealings between a qualifying facility and affiliates of any utility investors in the facility, the State points to a Michigan Commission order finding that the purchased power contract between MCV and Consumers Power was not negotiated at arm's length. As further evidence of non-arm's length dealing, the State argues that CMS has arranged its natural gas contracts such that its lowest cost gas would be delivered to MCV while its highest cost gas would be distributed at retail through the Consumers Power distribution network. While the State also seeks an opportunity to conduct discovery with respect to whether the facility will satisfy the operating and efficiency standards, it asserts that: (1) the request for waiver is inappropriate; and (2) the Commisssion should disregard the use of the Dow back-pressure turbine in calculating the facility's operating standard.

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[45] **State of Michigan Brief at 2.**

The State expands upon the allegation regarding the requested waiver in its answer to the MCV petition. Reiterating in summary fashion the ownership arguments presented in its brief, the State argues that since a utility subsidiary had an equity interest in the facility on the initial operation date (June 2, 1989), the original certification did not become effective by its terms on that date. Further, the State questions MCV's contention that the facility will meet the operating and efficiency standards for the 12-month period commencing June 2, 1989. Finally, Michigan questions the facts stated by MCV in support of its argument that the Commission should invoke its equitable powers to grant the waiver, as it did in the *Nelson* proceeding.

The State also contends that the original certification of the facility should be revoked. To that end, the State filed, in Docket No. QF87-237-000, a motion for intervention and declaratory relief, or alternatively, for reconsideration (Petition for Revocation) in which it argues that the facility met neither the ownership requirements nor the operating and efficiency standards on the initial operation date. In its brief in Docket No. QF87-237-001, the State points to what it characterizes as MCV's admission of failure to meet the standards in the petition for waiver. Adding that the Commission may, after providing an opportunity for hearing, revoke a facility's qualifying status pursuant to section 292.207(d) of the regulations,[46] the State argues that a hearing should be established here to determine whether declaratory relief or revocation of qualifying facility status in[sic]appropriate.

The State's supplemental brief points out that the Construction Term and Loan Agreement between CMS and a consortium of lenders led by the First National Bank of Chicago, executed June 9, 1988, requires MCV to dili-

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[46] 18 C.F.R. § 292.207(d) (1989).

gently pursue an application for final cerification for the MCV facility to reflect the changes in financial structure and ownership interests occurring since the initial certification. In spite of this contractual obligation, the State argues, MCV did not submit such an application prior to the initial operation date and, consequently, has been operating for roughly six months without an effective qualifying facility certification, i.e., the initial certification was not in effect because: (1) the financial structure had been altered in June of 1988; (2) the facility, by MCV's own admission, failed to meet the efficiency standards on the initial operation date; and (3) the owner of the initial certification was CMS Midland, Inc., not MCV. Further, even though the initial certification was not (allegedly) effective, the State charges that MCV waited five months to submit a recertification application and petition for waiver of the operating and efficiency standards. According to the State, those delays render as disingenuous the requests of MCV for review of the instant application on an expedited basis. In light of these delays, the arguments already made and the additional arguments presented in the supplemental brief, which were alleged to have come to light only after the filing of the State's initial brief, the State expresses the hope that the arguments will be reviewed only after an opportunity for a full evidentiary hearing.[47]

The additional bases for denial presented in the State's supplemental brief are that CMS continues to hold a greater than 50% equity interest in MCV and that MCV's calculation of the operating and efficiency standards is incorrect. With regard to the former, the State says that: (1) pursuant to the exhibits accompanying the filing of the Amended and Restated MDC Transfer Agreement (which was subsequent to the filing of Michigan's first brief), for a period of time at the beginning of the MCV project, CMS' share exceeded 50%; (2) at the

[47] State of Michigan Supplemental Brief at 3-4.

very least a hearing is necessary to determine, on a present value basis, whether CMS entitlements to profits and losses, when averaged over the three time periods referenced in Exhibit 1 of the December 1 filing exceed 50%; (3) Exhibit 2 to that filing indicates that MCV will receive an allocation of book depreciation in excess of 50%; and (4) while MCV has argued that CMS will take a loss on the MDC Notes, MCV fails to indicate that the MDC tax basis in the assets it is exchanging for $1.2-1.5 billion is only $1.05 billion indicating a profit of at least $150 million. With regard to the operating and efficiency standard argument, the State claims that some natural gas supplementary firing inputs, which should be included in the calculations, have not in fact been included.

The Michigan Municipals also argue that the MCV facility cannot comply with the Commission's ownership requirements. Like the State, they argue that CMS controls MCV and that CMS will receive more than 50% of the benefits from the facility. With regard to the latter they argue: (1) that CMS will obtain disproportionate benefits through receipt of the MDC Notes for assets whose net worth is allegedly far less than that of the notes; (2) CMS will receive excessive gas profits as the result of MCV manipulations; and (3) Consumers Power has undertaken disproportionate burdens for MCV by potentially incurring large losses, including the cost per kW proposed to be paid for the power from the facility. The Municipals also characterize the MCV facility as a Consumers Power plant, arguing that beyond its use of portions of the cancelled nuclear plant, the contracts establishing the benefit and burdens for MCV owners were "negotiated" when Consumers Power held a greater-than-50% interest in the facility and that the dealings between MCV, Consumers Power and Dow were substantially controlled by Consumers Power.

Even if the MCV project is deemed independent of Consumers Power, the Municipals argue that, as MCV

received assets which were almost certainly constructed before November 9, 1978, it does not meet the standard for new capacity. *See* 18 C.F.R. § 292.304(b)(1) (1989).[48] In addition, the Municipals charge that MCV will not meet the ownership criteria because MCV or a combination of co-owners may be held to be majority-owner utilities. Further, they contend that MCV is being used by Consumers Power contrary to antitrust law and policy and should not therefore be entitled to waivers of strict enforcement of PURPA requirements.

The Municipals also allege that MCV has violated the initial certification, alleging that the facility has been operated with significant technical changes to the plant as certified and while changes were being made to the agreements providing for the transfer of assets to the partnership as originally approved by the Commission. In addition, they contend that the application fails to account for a number of factors that will result in a system efficiency that will not meet the Commission's requirements, and the information contained in MCV's application is wholly inadequate to allow the MCV calculations to be verified.

With respect to the MCV waiver request, the Municipals contend, *inter alia*, that PURPA was not, as MCV contends, the impetus behind the conversion of the Midland facility as was found to be the case in *Nelson*. Like the State, they also question certain facts cited by MCV, such as the creation of employment and the stimulation of economic growth, in support of a grant of waiver on equitable grounds.

In their supplemental amendment to the motion to intervene (Supplemental Amendment), the Municipals seek Commission consideration in a single proceeding of the information submitted by MCV in this proceeding and

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[48] Section 292.304(b)(1) provides: "For purposes of this paragraph, 'new capacity' means any purchase from capacity of a qualifying facility, construction of which was commenced on or after November 9, 1978."

that submitted in Docket No. QF87-237-002 on November 4, 1989 (the second application).[49] The Michigan Municipals argue that the second application contains information directly relevant to the issues presented in the instant proceeding and which is necessary to ensure that a complete and accurate understanding of the full nature of the proposed arrangements and transactions encompassed by the two applications may be obtained. In that regard, the Municipals contend that looking at all the facts of both applications presents a total picture of a project that, as it now stands, is so complex, particularly in terms of evaluating the control issues, that it cannot be concluded from the first application that the partnership meets the tests established under PURPA.[50]

In support of their contentions, the Municipals point to their challenge to the allegedly excessive purchase price to be paid to MDC for the Net Project. Because the Commission must evaluate the actual streams of revenues, costs, burdens and benefits to determine the ownership of a facility, the Municipals contend that a key factual issue to be explored in a hearing is whether MCV will pay (or has paid) an excessive amount; i.e., if Consumers Power or its parent, CMS Energy, is to receive directly or indirectly, as a result of creating the MCV facility,

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[49] In the second application, MCV seeks another recertification to reflect a further change in ownership that would result from a leveraged lease arrangement proposed for permanent financing of the facility. Certain investors (Owner Participants) will purchase the facility and lease it back to MCV. Among the prospective Owner Participants are two affiliates of electric utilities and an affiliate of Consumers Power.

MCV has indicated that it expects the leveraged lease closing to occur some time in late January or February of 1990. However, MCV has also specifically requested that the instant application be acted upon before the leveraged lease application and, if necessary, that consideration of the second application be deferred to avoid any delay in this proceeding.

[50] Michigan Municipals Supplemental Amendment at 2-3.

hundreds of millions of dollars in excess of what it otherwise could have obtained, those revenues must be counted as a major benefit in evaluating whether the CMS Midland interests in MCV exceed the Commission's 50% limitation.

According to the Municipals, information contained in the second application confirms that MCV intends to pay Consumers Power (through MDC) as much as can be justified by capitalizing the anticipated future revenue streams derived from the sale of power from the MCV facility to Consumers Power, subject to a transfer price limit. In that regard, they point out that the second application describes the relation between the purchase price and the anticipated future revenue streams. Specifically, if the Michigan Commission allows a higher rate for the sale of electricity by MCV to Consumers Power, that will translate into a higher purchase price, which in turn will result in higher lease payments from MCV to the owner/lessors (including to the affliate of Consumers Power that will participate as an Owner Participant). However, they note that the second application indicates that the benefit of the higher sales price of the MCV plant will not be retained by MCV and its owners; instead, any increase in the electricity price will be applied to increase the price to be paid (through the notes) to MDC. Further, they note that MDC is also listed as one of the "Loan Participants" in the second application, and that the purchase price for the sale of the MCV facility will be funded with the equity investment provided by the Owner Participants (including a Consumers Power affiliate) and with the loans provided by the Loan Participants (including MDC).

The Municipals argue that it would be inconceivable under an arm's-length relationship for the owner of the cogeneration project to agree to increase its payments to a supplier or constructor of facilities in the event that the project became more profitable because of an increase in the

sales price of the electricity to be generated by the project. The result, claims the Municipals, is a clear transfer of benefits to Consumers Power that belies the claim that the CMS Midland equity interest in MCV is limited to 50% or less. The Municipals argue that under the circumstances, with Consumers Power on all sides of the transactions (through affiliates), and where Consumers Power (through affiliates) receives more for transferred facilities based upon profitability, at a minimum the added payments must be assumed to be evidence of control by Consumers Power and a flow through of future additional profits to Consumers Power in amounts beyond its stated ownership share of MCV.

As the leveraged lease transaction adds new changes and new complications to ascertaining the complicated financial transactions which are taking place and to assessing the risks and benefits, the Municipals conclude that the Commission simply cannot find on the basis of the items presented in the first application that Consumers Power is not, in fact, receiving more than 50% of the economic benefits from the project. Accordingly, given the complications of the transaction, the Municipals argue that the leveraged lease and the original "recertification" requests must be looked at together.

MCV Responses

As noted, MCV has responded to both the State and the Michigan Municipals. The details of the responsive arguments are presented below, together with the details of the intervenors arguments and our resolution. On balance, MCV contends that several of the arguments are irrelevant to a certification proceeding and others present an incorrect interpretation of the facts and or Commission administration of PURPA. As a general proposition, MCV argues that there is no need for an evidentiary hearing as there is no material issue of fact to be resolved.[51]

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[51] MCV Answer to the State Brief at 20 and MCV Answer to Michigan Municipals Protest at 45, *citing Kansas Power & Light*

Further, MCV argues that even where a *bona fide* dispute as to the interpretation of a particular provision within a document may be deemed to exist, this is insufficient to warrant a hearing because varying interpretations of contractual terms and provisions are a question of law, not of fact, and do not necessitate a hearing.[52] With respect to the State's intervention, MCV contends that the principal issue raised is whether the rights created under the MCV documents constitute an equity interest. This is a legal rather than a factual issue, MCV argues. Further, with regard to the Michigan Municipals' arguments, MCV adds that a difference in policy perspective (which MCV contends animates the Municipals' opposition) does not constitute a factual dispute warranting a hearing.[53] Thus, MCV contends the case centers on questions of law which can be decided solely on the basis of the information presented to the Commission in the applications and exhibits.[54]

MCV also charges that the Michigan Municipals have not met the requirements for intervention under Rule 214 of the Commission's Rules of Practice and Procedure.[55] In brief, MCV alleges that the Municipals have not alleged entitlement to intervene as a matter of right or that

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Co. v. FERC, 851 F.2d 1479, 1484 (D.C. Cir. 1988); *ANR Pipeline Co. v. FERC*, 870 F.2d 717, 723 (D.C. Cir. 1989); *Consolidated Oil & Gas Inc. v. FERC*, 806 F.2d 275, 280 (D.C. Cir. 1986); *Vermont Department of Public Service v. FERC*, 817 F.2d 127, 140 (D.C. Cir. 1987); *Citizens for Allegan County v. FPC*, 414 F.2d 1125, 1128 (D.C. Cir. 1969).

[52] *Sacramento Municipal Utility District v. Pacific Gas and Electric Company*, 24 FERC ¶ 61,305 (1983).

[53] MCV Answer to the Michigan Municipals Protest at 46, *citing Independent Petroleum Ass'n of America v. Economic Regulatory Administration*, 870 F.2d 168, 173 (5th Cir. 1989).

[54] *Id. citing Citizens for Allegan County, Inc., supra*, 414 F.2d at 1129.

[55] 18 C.F.R. § 385.214 (1989).

their participation is in the public interest.[56] Rather, MCV states, the Municipals' motion rests solely on the requirement that a movant demonstrate that it has or represents an interest which may be directly affected by the outcome of the proceeding.[57]

MCV submits that the motion fails since the Municipals have not or can not demonstrate that they are either consumers, customers, competitors or security holders of MCV.[58] MCV argues that the Municipals fail to establish how the outcome of the recertification application will affect their interest (stated in the Municipals' motion to intervene) in "obtaining economic power supply, competitive market conditions and coordinated planning to assure that their members and ratepayers have economic, reliable and environmentally sound electricity."[59] To that end, MCV makes three arguments that the outcome of this proceeding: (1) will not directly affect the Municipals' ability to obtain economic power supply—since recertification will not involve a determination of rates that MCV will receive or effect rates that members of the Municipals pay Consumers Power; (2) has no direct effect on the Municipals' interest in competitive market conditions—since recertification will not preclude MCV

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[56] MCV Answer to the Michigan Municipals Protests at 5-14, *citing* 18 C.F.R. §§ 385.214(b)(2)(i) and (iii).

[57] *Id.* at 6, *citing* 18 C.F.R. § 385.214(b)(2)(ii).

[58] *Id.* Here MCV compares the Municipals' position to that of Arkla Energy Resources which sought to intervene in *El Paso Natural Gas Company*, 45 FERC ¶ 63,010 (1988), without being a customer or competitor of a party. MCV alleges that if the Municipals are allowed to intervene that could mean that competitors of its members would be allowed to do so since they would be customers or competitors of a party. MCV argues that the Commission should not allow such proliferation given the straightforwardness of the MCV request which has nothing to do with any issue in which the Municipals have a legitimate interest.

[59] *Id.* at 7, quoting Michigan Municipals Protest at 5.

from selling power to any member of the Municipals' and, conversely, will not have any effect on MCV's ability to compete with members of the Municipals in the sale of excess power; and (3) will have no direct effect upon the Municipals' ability to participate in coordinated planning with Consumers Power or any other utility—as Consumers Power is contractually obligated to purchase specified amounts of capacity from MCV for a specified period, nor does recertification have any effect on access to the Consumers Power transmission system.[60] MCV also argues that the interest of certain of the Municipals' members "participating" in MCV under a 1979 settlement will not be affected by recertification as the apparent dispute in question between Consumers Power and certain members of the Municipals has nothing to do with the request for recertification.[61]

MCV also contends that the Municipals' Supplemental Amendment raises no new arguments or facts that were not set forth in their original motion to intervene and protest, and fails to advance any reason why a consolidation of the two recertification applications is necessary. MCV first indicates that in light of the lack of new facts or arguments it will make no further reply. With respect to the request for consolidation, MCV states that the second application presents one simple question, "whether the transfer of ownership of the facility to a group of passive investors comprised in part (but not exceeding 50%) of utility affiliates will adversely affect qualifying facility status."[62] MCV argues that this issue has no relevance to the qualifying status of the facility as presented in the instant application. In fact, MCV avers, the second application is premised upon a grant of the first and the issue presented is conceptually separate from any issue in

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[60] *Id.* at 7-13.

[61] *Id.* at 14.

[62] MCV Answer to the Michigan Municipals Supplemental Amendment at 2-3.

the first. Adding that it would suffer substantial prejudice and hardship as a result of any delay in the instant case, MCV requests denial of the request for consolidation.

Discussion

The notice of intervention and timely, unopposed motion to intervene filed, respectively, by the Michigan Commission and the State, serve to make them parties to Docket No. QF87-237-001. Notwithstanding MCV's opposition, we will also grant the Michigan Municipals' motion to intervene in Docket No. QF87-237-001, given the interests of the constituency they represent and that their participation is in the public interest.

I. Preliminary Matters

In view of some of the comments and arguments raised, we believe it is necessary to clarify certain matters regarding the qualifying facility (QF) certification process before addressing the merits of MCV's application and request for waiver. These matters include the nature of the Commission's QF certification process, the point in time at which an order granting certification of qualifying status becomes operative, and the scope of a proceeding where the Commission considers an application for qualifying facility status.

First, the Commission, in acting on an application for certification of qualifying status, essentially renders a declaratory order. We act upon the information presented in the application and pleadings and render a decision on whether or not the facility, as described in the application, meets or does not meet the statutory and regulatory requirements for qualifying facility status set forth in PURPA and our implementing regulations. As with any other Commission declaratory order, a Commission order on an application for certification of qualifying status is based strictly on the facts presented. If those facts subsequently are changed in any respect, the Commission's

order cannot be relied upon since different factual circumstances are presented—circumstances not considered by the Commission. However, a change in the facts presented will not necessarily affect whether or not a facility is a qualifying facility. The answer to that question ultimately turns on whether the facility satisfies the technical and ownership requirements for qualifying facility status set forth in PURPA and our regulations.[63]

The second matter that should be discussed is the point in time at which a QF certification order becomes operative. Technically speaking, a Commission order becomes effective as of the date of issuance of the order. 18 C.F.R. § 375.204(e) (1989). However, for purposes of QF certification, the critical[64] date is the date the facility first produces electrical energy. At that moment, factual representations in the application must be satisfied if the Commission's order granting certification is to be meaningful. This stems from the statute, as discussed below.

Section 3(18)(A) of the Federal Power Act defines a *cogeneration facility* as one which "produces—(i) electric energy, and (ii) steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating

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[63] For example, assume that a corporation having 100 shares of stock owns a facility which clearly satisfies the technical requirements. When the application for certification of qualifying facility status is considered by the Commission, 10 of the 100 shares are owned by an electric utility and 90 of the shares are owned by nonelectric utility entities. On these facts, the Commission grants the application and finds that the statutory and regulatory requirements are satisfied. The day after the Commission's order, a nonutility shareholder sells 1 share to an electric utility so that 11 shares are owned by electric utilities and 89 shares are owned by nonelectric utility entities. While the Commission order is not effective due to the change in facts, there is no question that the facility still satisfies the stautory and regulatory requirements.

[64] Of course, if the facility is already producing electricity and subsequent events transpire which lead to a request for recertification, the critical date is the date of the subsequent events.

or cooling purposes; . . ." 16 U.S.C. §§ 796(18)(A)(i)-(ii) (1988). Section 3(18)(B) defines a *qualifying cogeneration facility* as a cogeneration facility which "(i) the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use and fuel efficiency) as the Commission may by rule prescribe; and (ii) is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities); . . ." 16 U.S.C. §§ 796(18)(B)(i)-(ii) (1988). For purposes of this discussion, the operative word in the above definitions is "produces." Since a facility cannot be a qualifying cogeneration facility unless it is a cogeneration facility and, by definition, a facility cannot be a cogeneration facility before it produces electric energy, whether the facility satisfies the statutory and regulatory requirements for qualifying status *before* the facility produces electric energy is irrelevant.

In this case, the Midland cogeneration facility began producing electric energy on June 2, 1989 and that electric energy began flowing in interstate commerce. If MCV cannot meet the statutory and regulatory requirements for qualifying status as of that date, then it is a public utility subject to our jurisdiction under the Federal Power Act, since the electric energy as of that date was sold to Consumers Power for resale. *See generally* 16 U.S.C. § 824 (1988); 18 C.F.R. § 292.601 (1989). Therefore, the Midland facility must satisfy the statutory and regulatory requirements for qualifying status as of June 2, 1989.

The third matter to be explained is the scope of this proceeding. In fact, the scope of the proceeding is rather narrow. The purpose of this proceeding is to determine whether the Midland facility:

> meets the requirements established by the Commission respecting fuel use, fuel efficiency, and reliability

> and if it is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities) [or small production facilities].

PRI Energy Systems, Inc., 26 FERC ¶ 61,177, at p. 61,434 (1984). In other words, does the Midland facility satisfy the operating and efficiency standards in 18 C.F.R. §§ 292.205(a) and (b) (1989) and the ownership criteria in 18 C.F.R. § 292.206 (1989)? Of course, since the Midland facility did not satisfy the technical standards in calendar year 1989, as evidenced by the Applicant's request for waiver, we must in this proceeding also determine whether good cause has been presented for waiver.

The purpose of this proceeding is not to investigate all of the dealings between Consumers Power, CMS, MCV, etc. concerning this project. This is not to suggest that many of the intervenors' arguments may not be properly raised before the Commission, the Michigan Commission and the courts in other proceedings. However, this QF certification proceeding is not the proper forum to consider a plethora of claims which do not bear on whether this facility satisfies the statutory and regulatory requirements for a qualifying cogeneration facility. Accordingly, to the extent an intervenor's argument is not discussed below, it should be deemed to have been found irrelevant to issues relating to QF certification.

With the above decisional framework in mind, we next summarize the result of our analysis and then turn, in order, to the specific questions:

> (a) Does the facility satisfy the ownership requirements?
>
> (b) Does the facility satisfy the technical requirements?
>
> (c) Should waiver of the operating and efficiency standards for calendar year 1989 be granted?

A chronology of the various agreements and pertinent dates involved in the Midland venture is attached as Appendix A to aid in understanding our analysis and conclusions herein.

II. Decision Summary

We will grant the application for recertification and petition for waiver and deny the request for consolidated consideration of the instant application and the application submitted in Docket No. QF87-237-002. As described in detail in the following discussion, we find that, notwithstanding the technical and ownership changes to the facility, the facility satisfies the requirements of our regulations governing the certification of qualifying cogeneration facilities. We also find that in light of our findings that, but for the operating and efficiency standards for calendar year 1989, the facility satisfies not only the statutory and regulatory requirements but also substantially complied with our initial certification order, and in light of the facility's unprecedented size, sufficient reasons exist for invoking our general equitable powers to grant the waiver. We further find that while information presented in the second application, involving the sale leaseback transaction, does indeed demonstrate that the transactions addressed therein are part of a larger whole, including the transactions which are before us here (a fact which MCV has acknowledged), the matters are conceptually separate, and the information in the second application does not change the facts upon which we base the instant recertification.

We will also deny the State's motion for intervention in Docket No. QF87-237-000 (the proceeding originally certifying the facility) for failure to state good cause to grant intervention over two years subsequent to the closing of the record in that proceeding. *See* 18 C.F.R. § 385.214(d)(1)(i) (1989). We also dismiss the State's petition for revocation based on our finding that in light of our decision to grant the requested waiver of the oper-

ating and efficiency standards for calendar year 1989, the MCV facility was a qualifying facility on June 2, 1989, the initial operation date. Therefore, we dismiss as moot the State's petition for revocation of qualifying status granted by our original certification.

We also dismiss as moot the MCV motion for expedited treatment seeking a decision by the Commission's meeting of January 17, 1990, or shortly thereafter, and responsive pleadings of the State and the Michigan Municipals. This proceeding was initiated on November 2, 1989, with the filing of the MCV application. Pursuant to section 292.207(b)(5) of our regulations [65] that would have meant a Commission order on the application would be required to issue by January 31, 1990 or the application would be deemed to have been granted. Even though the application was completed on December 1, 1989, pushing back the decision date by 29 days, this order is being issued at the conclusion of the original 90-day period. Given the size of the record compiled herein, the late hour of several of the pleadings filed by the parties, including two MCV pleading on January 18, 1990, we are satisfied that the public interest has been served.

III. Ownership Requirements

Pursuant to section 3(18)(B)(ii) of the FPA, a qualifying cogeneration facility must be:

> owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities).

16 U.S.C. § 796 (18)(B)(ii) (1988). The Commission's regulation implementing that provision, section 292.206(b), states that:

> a cogeneration or small power production facility shall be considered to be owned by a person pri-

[65] 18 C.F.R. § 292.203(b)(5) (1989).

> marily engaged in the generation or sale of electric power, if more than 50 percent of the equity interest in the facility is held by an electric utility or utilities, or by an electric utility holding company, or companies, or any combination thereof. If a wholly or partially owned subsidiary of an electric utility or electricutility [sic] holding company has an ownership interest of a facility, the subsidiary's interest shall be considered as ownership by an electric utility or electric utility holding company.

18 C.F.R. § 292.206(b) (1989). The Commission has interpreted "equity interest," as applied in a partnership context, through several cases including the prior certification proceeding for the Midland facility. We have explained that the decisive factors are the "stream of benefits" from the project and control of the venture. *CMS Midland Inc.*, 38 FERC ¶ 61,244, at p. 61,827 (1987), *citing Ultrapower 3*, 27 FERC ¶ 61,094 (1984). The stream of benefits has been defined in the cases as the distribution of profits, losses and surplus from a venture. *Id.* Control has been examined to determine how partners share in all aspects of the partnership, with the inquiry focusing on voting interests as well as special agreements (such as service contracts) between utility partners (or their affiliates) and the partnership. *Dominion Resources Inc.*, 43 FERC ¶ 61,079, at p. 61,251 (1988). In short, we look to the investment in and the realization of gain from the venture, and not merely the exercise of control, to determine the equity interest. *KP Diversified Investors, Inc.*, 32 FERC ¶ 61,013, at p. 61,050 (1985).

A. *The Partnership Agreement*

In examining a qualifying facility partnership to determine the equity interest held by an electric utility, electric utility holding company or a subsidiary of either, the Commission focuses on the partnership agreement. That document controls and at the same time demonstrates

the electric utility partners' obligations and expectations with respect to the stream of benefits from and control of the facility.[66] Here, however, numerous allegations are made that circumstances surrounding the creation of the MCV partnership require the Commission to find that the equity interest test is not satisfied even if the partnership agreement alone would cause the MCV partnership to meet the ownership test. In addition, it is suggested that since Consumers Power, through its CMS Midland subsidiary, was entitled by the partneship agreement to more than 50% of the facility's benefits for certain periods, the facility was in violation of our earlier certification.[67]

The prior certification of the Midland facility recognized that the partnership would not comply with the Commission's ownership requirements until the initial operation date. *CMS Midland Inc.*, 38 FERC at p. 61,827. That is consistent with the requirement that compliance with the Commission's regulations must occur on the date when the facility produces energy. The intervenors challenge whether the ownership of the facility complied with the terms of the prior order as of the date of initial operation. As noted, however, although a change in facts may mean that a facility does not strictly comply with terms of a certification order, it may still be a qualifying facility by virtue of its compliance with the ownership and technical requirements for qualifying status set forth in our regulations. Accordingly, the issue is whether, on June 2, 1989, MCV was in compliance with the Commission's requirements.

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[66] *See, e.g., Midway-Sunset Cogeneration Company*, 47 FERC ¶ 61,273 (1989); *Leathers, L.P.*, 46 FERC ¶ 62,266 (1989); *Chalk Cliff Ltd.*, 46 FERC ¶ 62,125 (1989); *Morgantown Energy Associates*, 45 FERC ¶ 62,263 (1988); *Del Ranch, L.P.*, 45 FERC ¶ 62,248 (1988).

[67] For example, the State of Michigan points out that CMS was entitled to 54% of the benefits prior to the execution of Amendment No. 1. *See* State of Michigan Supplemental Brief at 4.

We find that the Amended and Restated Partnership Agreement describes an ownership structure that was in compliance with our regulations as of June 2, 1989. In that regard, review of the Agreement, Amendment No. 1, and the September 27, 1989 Memorandum of Agreement with respect to the Agreement, confirms MCV's representations concerning the operation of those agreements. Specifically, as of June 13, 1988, CMS Midland's voting power was limited in all circumstances to 49%.[68] Subsequently as of May 26, 1989 when Amendment No. 1 was executed, CMS Midland's share of profits, losses and surplus was limited to 49%.[69]

As MCV points out, the Amended and Restated Partnership Agreement does provide that allocations to CMS Midland of depreciation for partnership book accounting purposes may exceed 50%.[70] However, we agree with MCV that this provision will not affect the benefits to be derived from the facility.

We have previously found that tax depreciation is included in the stream of benefits calculation because it produces a benefit in terms of tax savings that has an ascertainable value to the partner assigned the tax depreciation. *See James River Cogeneration Company and Cogentrix of Virginia, Inc.*, 44 FERC ¶ 61,352 (1988). In *James River*, the partnership agreement provided in effect that the book and actual allocations of depreciation were the same. Here, in contrast, the partnership agreement specifically distinguishes between the two. It contains a formula for allocation of book depreciation which

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[68] *See generally* Article IV of the Amended and Restated Limited Partnership Agreement.

[69] Tax depreciation was separately capped at 49.9%. *See generally* Article IV of the Amended and Restated Limited Partnership Agreement and Amendment No. 1 to the Amended and Restated Limited Partnership Agreement; MCV Application, Appendix B.

[70] *See* Sections 4.1(b) and 4.5(a)(iii)(f) of the Amended and Restated Limited Partnership Agreement.

could result in CMS Midland obtaining more than 50% of the facility's book depreciation, but provides that for purposes of depreciation actually taken by the partners for tax purposes, CMS Midland shall be limited to the aforementioned 49.9%. The result of this arrangement is to lower the amount to which CMS Midland will be entitled upon liquidation of the partnership. If its capital account is below zero at that point, it may be required to make up (by the difference between the book and actual amount) the negative balance in its capital account. However, CMS Midland does not derive any savings from the book depreciation provision that may constitute an additional benefit to be included within the stream of benefits.

The State of Michigan contends that despite the partnership agreement's limitations on CMS Midland with respect to control of the partnership, CMS Midland in fact controls the partnership in several important respects. According to the State, Amendment No. 1 indicates that CMS Midland may unilaterally admit additional partners and unilaterally agree with such additional partners upon the New Partners' allocation of depreciation, amortization and cost recovery. The State also points to a provision in the Memorandum of Agreement with respect to the partnership agreement that "CMS [Midland] shall retain final authority to implement the Drexel Proposal," [71] which is a proposed plan to refinance MCV. Finally, the State says the Agreement itself vests in CMS Midland "in its sole discretion," the authority to require other partners to reduce their contributions to capital in the enterprise by as much as $138 million.[72] The State concludes that CMS Midland enjoys unilateral control over crucial aspects of the partnership's structure and financing and that

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[71] State of Michigan Brief at 14, *citing* Memorandum of Agreement with Respect to the Amended and Restated Partnership Agreement at 4.

[72] *Id., citing* Amended and Restated Partnership Agrement at 30.

the Commission should recognize that control in determining whether CMS Midland exceeds the ownership limitations established under PURPA. It cites the Commission's indication in *Dominion Resources Inc.*, that it would look to management control to demonstrate how partners share in all aspects of a partnership.[73]

MCV responds that the State is incorrect that CMS Midland controls the partnership based upon the partnership agreement, Amendment No. 1 and the Memorandum of Agreement with respect to the partnership agreement. In the first two instances, MCV points out, the delegation of authority terminates on the closing date, which must occur prior to commercial operation of the facility. Specifically, pursuant to Amendment No. 1, CMS Midland may, "on the Closing Date, *on behalf of the General Partners*, admit one or more Additional Partners" whose sharing percentages shall be as agreed between CMS [Midland] and each Additional Partner.[74] In addition, pursuant to the partnership agreement, CMS Midland may agree that the capital contributions required from certain other partners on the Closing Date may be reduced.[75]

In response to the State's argument concerning CMS Midland's authority to implement the "Drexel Proposal," MCV says this provision proves quite the opposite proposition. The definition of "Drexel Proposal" in the Memorandum of Agreement illustrates that (i) CMS Midland has been granted authority to implement a refinancing proposal that was agreed to by the majority non-CMS Partners and (ii) CMS Midland is not authorized to

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[73] 43 FERC ¶ 61,079 (1988).

[74] *See* Section 1.5 of Amendment No. 1 to the Amended and Restated Limited Partnership Agreement; MCV Application, Appendix B, Tab 2 at 3. (emphasis supplied).

[75] *See* Sections 3.1(e) and 3.2(c) of the Amended and Restated Limited Partnership Agreement; MCV Application, Appendix B, Tab 1 at 30 and 32-33.

deviate from the agreed upon proposal without the approval of a majority of the non-CMS Partners, as opposed to a majority of all partners. Thus MCV argues, CMS Midland has less, not more, influence over this aspect of MCV's affairs than would be permitted under the Commission's regulations, as CMS Midland's vote is not counted at all for purposes of determining whether any refinancing proposal other than that previously agreed upon by the non-CMS Partners would qualify. Moreover, MCV points out that, under section 5.1 of the Partnership Agreement, CMS Midland does not even have a 50% vote, as would be permitted under section 292.206(b) of the Commission's regulations, but only a 49% vote. In fact, MCV adds, CMS Midland has significantly less ability to "control" the qualifying facility than does a utility affiliate in a typical "50/50" partnership, because decisions that can be made by a majority of the partners do not require the consent of CMS Midland.[76]

We find nothing in the State's arguments to disturb our conclusion that as of June 2, 1989, MCV met our electric utility equity interest test. Regarding the authority granted to CMS Midland to implement the Drexel Proposal, our review of the documentation confirms MCV's assertions. CMS Midland's role appears to be purely ministerial, and as MCV indicates, CMS Midland really has no voting power with regard to the required implementation.

Likewise, the additional (partner) admission and associated capital contribution reduction provisions are delegations of authority that do not change CMS Midland's

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[76] As examples of routine approval of partnerships in which utility affiliates have had a 50% vote in the partnership's affairs MCV cites, among others, *Soledad Energy Limited Partnership*, 49 FERC ¶ 62,125 (1989); *Midway-Sunset Cogeneration Company*, 47 FERC ¶ 61,273 (1989); *Leathers, L.P.*, 46 FERC ¶ 62,266 (1989); and *Chalk Cliff Limited*, 46 FERC ¶ 62,125 (1989). MCV Answer to State of Michigan Brief at 12, n. 3.

entitlements or obligations (with regard to benefits or control) otherwise established by the partnership documentation. A close reading of the sections cited by the State reveals that CMS Midland's delegated authority to admit additional partners is ministerial. There is a limit on the total amount of the sharing percentages available to any Additional Partners.[77] The capital account reductions merely recognize the need for rollback of the non-CMS Partners' capital contributions in the event of any such additional admissions.[78] For example, even though additional partners may be added subsequent to June 2, 1989, the managerial decision was finalized on May 26, 1989, the date the Amended and Restated Partnership Agreement was executed. It is thus clear that the sharing and control percentages allocated to CMS Midland satisfied the statutory and regulatory requirements on June 2, 1989. Accordingly, we reject the State's arguments that the partnership documentation provides CMS Midland with greater than 50% control of the partnership's operations.

B. *The Related Transactions and Their Effect on Utility Ownership*

Subject to one minor exception,[79] the intervenors do not direct their arguments at the partnership agreement. Rather, they argue that MCV cannot meet the ownership requirements of 18 C.F.R. § 292.206(b) (1989), based upon the totality of the transactions surrounding the formation and financing of MCV, as well as the negotiations of agreements including those between MCV, Consumers

[77] That limit is the lesser of a stated percentage or a percentage that will not cause the current non-CMS Partners' sharing percentages to fall below certain percentages stated in this provision.

[78] *See* Section 1.5 of Amendment No. 1, restating in its entirety section 4.8(d) of the Amended and Restated Limited Partnership Agreement; MCV Application, Appendix B, Tab 2 at 3.

[79] *See* Discussion of MCV's power to admit other partners prior to the closing date, *supra* section III A.

Power and Dow. The arguments are divided principally into three areas: the stream of benefits; control of the partnership; and affiliate contracts.

1. The Stream of Benefits

a. The Net Project Assets and the MDC Notes

The State of Michigan argues that the MDC Notes are equity rather than debt. First, Michigan argues, the MDC Notes are subordinate to a 16% minimum rate of return on equity requirement for each of the other MCV partners. Contending also that the guaranteed return to the non-CMS partners is really 20% (according to Amendment No. 1 to the Partnership Agreement), the State says that prior to CMS receiving its $1.2 to $1.5 billion in "debt" payments, it has been provided that the other partners in the MCV partnership must receive that guaranteed return and this subordination of ostensible "debt" to the claims of other partners is a clear indication that the notes are actually equity.[80]

Michigan argues further that this classification is consistent with the Commission's analysis in *KP Diversified Investors Inc.*,[81] in which the Commission reasoned that instruments would be characterized as debt rather than equity if the indebtedness was prioritized above equity. The State contrasts the holding in *KP* with that in *Ultrapower 3*,[82] where the Commission held that the initial capital contributions were "debt" because they could be returned to the contributing utility upon dissolution of the partnership, prior to distribution of any other partnership assets; the State points out that unlike the situation in *Ultrapower 3*, KP did not indicate that capital contributions would be returned to the investors prior to any other

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[80] State of Michigan Brief at 8.

[81] 32 FERC ¶ 61,013 (1985).

[82] 27 FERC ¶ 61,094 (1984).

distributions of assets upon dissolution of the partnership, and the Commission thus recognized that subordinated debt could be appropriately characterized as equity if, as is the case here, the debt is subordinated to equity interests.[83]

The State's second argument for characterizing the MDC Notes as "equity" is based on the manner in which the amount of the notes fluctuate with the profitability of the partnership. The amount of the MDC Notes could increase from $1.2 billion to $1.5 billion if the avoided capacity charge for qualifying facility capacity in Michigan is approved at 4.15¢/kWh. The State points out that in its original order granting certification the Commission commented that the "Special Partnership Interests" were fixed and did not fluctuate with the level of any profit, and that this fact was one of the bases for the Commission's finding that the "Special Partnership Interest" was "debt" rather than "equity." The State argues that the MDC Notes should be characterized as "equity" rather than "debt," since they do fluctuate with the profitability of MCV.

The State's third argument that the MDC Notes are equity is that they are being exchanged for assets that have a fair market value that is well below the $1.5 billion claimed by MCV. Arguing that even though it has not had the opportunity to explore through discovery what actually constitutes the transferred assets, the State says it has discovered that some assets with absolutely no value constitute a portion of the $1.5 billion. Citing a case pending before the Michigan Commission, the State points out that a Consumers Power/CMS witness indicated that over $154 million of remedial soils work for the Midland nuclear plant and over $50 million incurred by Consumers Power in a construction completion program for its nuclear reactor had been transferred to

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[83] State of Michigan Brief at 9, *citing* 32 FERC at p. 61,052 n. 17.

MCV.[84] Questioning the possible use of these assets to a natural gas cogeneration facility, the State says the assets nonetheless constitute part of the $1.5 billion that was conveyed to MCV as "usable" investment from CMS' abandoned nuclear facility. Adding that these assets obviously would not have been transferred to a natural gas production facility in an arm's-length transaction, the State argues that compensation for these assets through the MDC Notes indicates that the notes constitute a division of MCV profits or surplus, rather than debt payments for a capital contribution to MCV.

The State also presents a table based upon various valuations of the "usable" Midland nuclear plant assets, and a summary of the amount by which the transfer price (as evidenced by the MDC Notes) exceeds the value of the assets to be transferred by MDC. According to the State, even using these numbers, the MDC Notes provide $274 million to $574 million of surplus to Consumers Power (via MDC). Under *Ultrapower 3*, the State argues, this surplus is more appropriately characterized as equity than debt.

The Michigan Municipals also address the issue of asset worth, contending that the cost of MCV would have to include a transfer of the Consumers Power assets at a reasonable worth rather than the amount Consumers Power (via MDC) proposes to receive and which, in economic reality, is a transfer of future anticipated profits unrelated to the worth of the assets to a gas turbine project. The Michigan Municipals argue that while the assets may have had a book value of 1.6 billion, their fair market value as components of a gas-fired cogeneration facility is significantly less, probably close to zero. They claim that no one would want gas turbine capacity at ap-

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[84] The remedial soils work assets were underpinning and foundation work necessary for a nuclear facility to withstand a "safe shutdown earthquake." The construction completion program costs are those incurred for reinspection of nuclear construction items.

proximately $1,600 per kW when a new plant can be built for about $600 per kW. By any definition, they argue, the notes are a transfer of benefits to Consumers Power and far exceed the amount for an arm's-length purchase of assets.[85]

The Municipals point next to MCV's presentation of a stream of benefits table and a list of the capital accounts, with the latter showing CMS Midland to have a capital account of $341 million out of a total of $696 million. Stating that the data are apparently designed to show that CMS Midland "just barely" meets the test of ownership to permit it to qualify for recertification, the Municipals point out that the table does not include the amount that Consumers Power will get from sale of the notes and that the capital account does not make any reference to that amount. If these amounts, or any portion thereof, were considered in the data supplied by MCV, CMS Midland's stream of benefits and capital account would be well over 50%, the Municipals argue. They state that if Consumers Power sold $1.2 billion worth of facilities and received $1.2 billion worth of notes in an arm's-length transaction, it is arguable that the amounts received by Consumers Power should not affect the stream of benefits and equity attributable to CMS Midland. Stating that it is apparent the assets do not have a value even close to that amount, the Municipals assert that the $1.2 to $1.5 billion transfer represents not an arm's-length sale of assets, but anticipated revenues or benefits from the project.

The Municipals cite as an example a *Barron's* article on the MCV, which states that the per kW cost of the MCV gas turbines, even using CMS Midland's own estimates, will be $1,440 per kW. (*See* Attachment C to Michigan Municipals Protest; October 30, 1989, letter from CMS Energy.) According to the magazine, if CMS built an equivalent amount of gas turbine capacity without the "benefit" of the Midland assets, the cost would

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[85] Michigan Municipals Protest at 23.

have been expected to approximate $600 per kW or $960 million total. (*See* Attachment C *supra*; reply of *Barron's* author.) That is, one could build gas turbine capacity for about one-third the cost of the MCV capacity simply by *not* purchasing and using the Midland nuclear plant assets.

The Municipals further contend that CMS's December 31, 1989, Form 10K filing with the Securities and Exchange Commission serves to confirm that the value of the notes is in reality anticipated revenues. Referring to statements in that filing that refer to the MDC Notes as subordinated notes which will be amortized over time, the Municipals argue that the notes represent future income. The Municipals also agree with the State regarding the potential fluctuations in the value of the notes. Referring to a letter by CMS to *Barron's*, indicating that Consumers Power's guarantees of certain profit levels to other partners may have been recently dropped, they point out that, in exchange, the value of the notes has also been reduced.[86] The Municipals argue that, at a minimum, a hearing is necessary to examine whether and to what extent the facility is utility owned.

MCV responds[87] that the MDC Notes do not constitute an equity interest since they are not subordinate to a 16% minimum rate of return on equity requirement for each of the other MCV partners. MCV points to the statement in the application that the New Partners required a limit on the consideration paid to MDC (via the notes) to an amount equal to the *lesser* of the Original Transfer Price or an amount which, based upon projections to be agreed upon by the Partnership and MDC prior to the In-Service Date, would permit the Partnership to achieve a projected 1.1 total debt service coverage

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[86] Michigan Municipals Protest at 27; *See also* Attachment C.

[87] MCV's answer to the Municipals on these issue is presented in its answer to the State. MCV Answer to Michigan Municipals Protest at 15, n. 4.

ratio for each year and would permit each of the New Partners to achieve a projected internal rate of return of not less than 16%."[88] MCV claims that this statement indicates only that New Partners required a limit on the amount of MDC Notes so that these partners would receive a *projected internal rate of return* of not less than 16%, not an *actual* return of 16%. MCV also notes that the forms of MDC Notes to be issued, together with the indentures relating to the notes, do not contain any suggestion that any payment on this debt is dependent upon any partner receiving any particular rate of return. Nor, MCV adds, is payment under either the Senior Notes or Junior Notes dependent upon any partner receiving or having received any rate of return on its investment or upon the profitability of MCV. In fact, the Applicant points out, as is customary with debt instruments of this type, distributions to partners are prohibited during the existence of any default under either the Senior Notes or the Junior Notes.[89]

MCV further notes that, pursuant to the partnership agreement, upon liquidation of MCV, "the assets of the Partnership shall be distributed . . . *first*, to the creditors (including Partners) in the order of priority as provided by law . . . and *third*, to each Partner."[90] Thus, MCV argues the agreement provides, as it must under applicable law, that claims of creditors (such as the holders of the MDC Notes) must be paid prior to assets being distributed to the Partners.

Turning to the arguments that the notes constitute an equity interest because the limit on the amount will be relaxed if the Michigan Commission approves an average

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[88] MCV Answer to the State Brief at 4-5, *citing* MCV Application at 30-31.

[89] *Id.* at 6.

[90] *Id.*, *citing* Section 10.3(b) of the Amended and Restated Limited Partnership Agreement.

capacity rate in excess of 3.77¢ kWh,[91] MCV states that, as is the case with all other notes, the payment of the MDC Notes is not subject to any level of equity return being achieved by any of MCV's partners. Moreover, MCV adds, the adjustment in purchase price for the transferred assets and in the amount of MDC Notes was negotiated between MDC and the non-CMS Partners in MCV as a method of matching the purchase price to the value of the transferred assets, and was negotiated at a time when CMS Midland had only a 49% vote as a general partner and the non-CMS Partners had a 51% vote.[92]

MCV points out that the limit on the MDC Notes to be issued can only operate to lower the amount of the MDC Notes. In that regard, the Applicant states that, while the adjustment in the amount of MDC Notes resulting from approval of a capacity rate in excess of 3.77¢/kWh could reduce the amount of the loss that will be suffered upon the sale of the assets of MCV, it cannot result in a profit.[93]

With regard to the argument that the MDC Notes constitute an equity interest because the assets to be transferred are worth less than the amount of the notes to be issued in payment, MCV reiterates that the amount of the MCV Notes was determined pursuant to negotiation between MDC and the non-CMS Partners at a time when CMS Midland's ownership and control of MCV was less

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[91] MCV filed the Power Purchase Agreement with the Michigan Commission in September of 1987 to seek approval of a 4.15¢/kWh capacity charge provided for therein. This rate has not been approved by the Michigan Commission but is the subject of ongoing proceedings before that Commission and appeals taken from those proceedings.

[92] This reduction took place pursuant to the Amended and Restated Limited Partnership Agreement, which was executed on June 13, 1988. MCV Answer to the State Brief at 7-8.

[93] *Id.* at 8.

than 50%. MCV also points out that the transfer of assets by a Consumers Power affiliate to MCV in exchange for notes is not a new issue, as the original application in 1987 indicated that the assets would be transferred to MCV at their March 31, 1986 book value, plus a time adjustment factor. Further, MCV states, this book value still establishes a maximum transfer price, subject to the overriding limit imposed by the New Partners. Thus, MCV contends, the argument that certain assets constructed in connection with the planned nuclear plant may not have the same value to MCV as these assets would have had in connection with the nuclear plant is irrelevant. Adding that the notes are based on the value of assets transferred, not merely on historical cost, MCV says that value is a function of the assets' ability to produce revenue and this is precisely why the New Partners insisted in the Amended and Restated MDC Transfer Agreement that the amount of MDC Notes (and therefore the purchase price to be paid for the assets) to be issued be in accordance with a formula based upon projected debt service coverage ratios and equity returns produced by the projected net revenue to be produced by these assets. While this limitation may result in a purchase price substantially less than the book value of the assets, MCV adds that once issued, the notes must be paid regardless of the actual performance of the facility and regardless of whether the partners ever receive any distributions.

We find that the notes constitute debt instruments. In sum, we agree with MCV that the MDC Notes take priority over the disbursements and allocations to the partners which constitute the principal component of the stream of benefits, and that the valuation of the assets reflects a decision by the non-CMS Partners as to the worth of the assets in terms of potential earnings. To understand this arrangement, the history of the events surrounding these arrangements is instructive.

In the original certification proceeding, the price of the Net Project (which the notes will be utilized to finance) was stated to be $1.5 billion. *CMS Midland Inc.*, 38 FERC at p. 61,829, n. 6. As pointed out by MCV, pursuant to the Original MDC Transfer Agreement, executed simultaneously with the Original Partnership Agreement, the $1.5 billion represented the March 31, 1986 book value of the Net Project and constituted the Original Transfer Price (subject to a time value adjustment factor). Under section 3 of the *Amended and Restated MDC Transfer Agreement*, executed *June 9, 1988*, this figure was recognized as the transfer price limit [94] which would be subject to adjustment to effect compliance with the requirements of section 4 of the agreement. Section 4 provides that the notes not provide for payment of principal and interest in an amount or on terms that would cause the debt service coverage ratio to be less than 1.1 to 1.0 or result in a projected internal rate of return for all non-CMS Partners, except Rofan, of 16%.[95] Section 5 of the agreement sets forth procedures for negotiation of the adjustments,[96] including a requirement that those negotiations shall be between MDC and the MCV partnership without the participation of CMS Midland.[97]

It was pursuant to the operation of section 5 that the non-CMS Partners and MDC reached the agreement documented in the *September 27, 1989 Memorandum of Agreement* with Respect to the Amended and Restated MDC Transfer Agreement.[98] Based upon required pro-

[94] *See* Amended and Restated MDC Transfer Agreement; MCV Application, Appendix B, Tab 2 at 19-24.

[95] *Id.* at 24.

[96] *Id.* at 24-27.

[97] *See* Section 5(f). *Id.* at 27. *See also* Section 5.7(e) of the Amended and Restated Limited Partnership Agreement; MCV Application, Appendix B, Tab 1 at 34-45.

[98] *See* Memorandum of Agreement; MCV Application, Appendix B, Tab 5 at 1.

jections taking into account the capacity price and amounts to be allowed by the Michigan Commission, the Memorandum describes the specific terms of the transfer price adjustments agreed upon to meet the requirements of section 4 of the Transfer Agreement. In addition to providing for interest of 9.5% (Junior Notes) and 10.35% (Senior Notes),[99] the Memorandum establishes a transfer price of approximately $1.2 billion. That price may be adjusted downward if: (1) a test performed with respect to the performance and efficiency of one of the gas turbines and heat recovery units indicates that the performance or efficiency of this equipment is below agreed-upon standards; or (2) a reduction in the average capacity rate payable under the Power Purchase Agreement below an average of 3.77¢/kWh is compelled pursuant to a valid "final rate order" of the Michigan Commission. The price may be adjusted upward if: (1) MDC enters into an additional power sales agreement meeting certain criteria prior to December 1, 1989; or (2) if the Michigan Commission approves an average capacity rate under the Power Purchase Agreement that exceeds 3.77¢/kWh.[100]

Though the structuring of the adjustments took place subsequent to June 2, 1989, the fact is that those adjustments were fully contemplated by section 4 of the June 9, 1988 Amended and Restated MDC Transfer Agreement. Significantly, the execution of the Amended and Restated Transfer Agreement preceded by four days the execution of the Amended and Restated Partnership Agreement. Thus, though the partnership (at the time of the transfer agreement amendment) did not contain the New Partners, the amended transfer agreement reflected their requirements regarding the value they placed on the assets and the form of payment therefor. In addition, the actual negotiation process regarding the final transfer

[99] *Id.* at 3-5.

[100] *Id.* at 6-8.

price (as reflected in the amount of the notes) excluded CMS Midland. Accordingly, the adjustments called for by the Memorandum of Agreement do not change the substance of the arrangement in place prior to June 2, 1989, providing for a price adjustment to meet the debt coverage and return requirements.

We believe this chain of events demonstrates that the notes are not equity. The fluctuation in the amount of the notes that may take place pursuant to the terms of the Memorandum represents solely a purchase price arrangement that was demanded by the New Partners as a condition precedent to their actually joining the partnership, and that agreement was executed prior to operation of the plant. Moreover, once the *amount* of the MDC Notes is fixed pursuant to the formula insisted on by the New Partners, the amount cannot vary based upon the performance of the facility.

If the capacity price and amounts currently allowed by the Michigan Commission do not change, Consumers Power will not receive $300 million of the Original Transfer Price. Thus, the new partners negotiated an arrangement that accepted the proposed transfer price on conditions that reflected the value to them of the project in terms of revenues that could be expected over the life of the project, i.e., on their terms. This is typical of the give-and-take of any bargain struck between nonaffiliated parties. In fact, the Consumers Power/MDC concession of a potential lowering of the Original Transfer Price demonstrates that it did ~~not~~ exert market power over the New Partners. Nor is there any other evidence to suggest that it had such power in relation to the other partners.

The value placed on the Net Project assets by the New Partners is also significant with regard to the intervenors' claims that the assets' fair market value is significantly less than $1.2-$1.5 billion or even worthless. Simply stated, the New Partners established a value which, as noted above, is what they believe the assets are worth in

terms of the revenues they may produce over the life of the project. There is no suggestion that Consumers Power was able to use market power to force these pricing arrangements on these parties; indeed, the concessions granted appear to prove the converse. Moreover, it is entirely reasonable to value assets based on the expected revenues that the use of those assets will provide. Accordingly, we do not find the intervenors' arguments concerning the adjustments to the purchase price to be valid.

We reject as unsupported the State's suggestion that the MDC Notes are higher in priority of distribution than equity interests. As MCV points out, the MDC Notes are not subordinate to the New Partners receiving a 16% rate of return. The 16% figure serves only to establish the amount of the notes as a means of establishing the agreed-to asset pricing, and there is nothing in the notes to indicate any such subordination. Further, pursuant to the partnership agreement, distributions upon liquidation go first to creditors, including the MDC noteholders, second to the Special Limited Partner, if any, and third to each partner pursuant to the ratio established by the balance in their capital accounts. As the State itself points out, we have previously found such an arrangement to be in the nature of debt. *Ultrapower 3*, 27 FERC ¶ 61,094 (1984) (holding that original capital contributions were essentially debt because they could be returned to the parties upon dissolution prior to distribution of any other partnership assets). Moreover, once issued the notes must be paid regardless of the actual performance of the facility and regardless of whether the partners ever receive any distributions.

b. CMS' Alleged Exposure to More than 50% of MCV's Risk of Loss

A second prong of the State and Municipal arguments that CMS will derive a greater than 50% share of the MCV stream of benefits is their contention that CMS is

exposed to more than 50% of potential losses by MCV. These parties point out that in *Ultrapower 3*, the Commission reviewed "entitlements to venture profits, *losses*, and surplus after return of initial capital contribution" in determining a utility's equity interest.[101] The State points to four examples of what it characterizes as CMS bearing more than 50% of the risk of loss in the MCV: (1) the subordination of the MDC Notes to the non-CMS Partners' "target" rate of return; (2) an assumption of "the lion's share of risk" via a capacity support agreement if MCV is unable to sell all of its power; (3) guarantees to the other partners of certain tax benefits; [102] and (4) the provision in the partnership agreement that if a partner's capital account is below zero at liquidation, that partner (other than Rofan) may be required to make up an increased negative balance in its capital account.[103]

With respect to (2) above, the State says that the agreement guarantees that CMS Energy will make up any shortfall in the amount of revenues that the MCV expects to receive under the terms of the purchased power agreement with Consumers Power. Regarding (4), the State assumes that if Rofan has a below zero balance in its capital account upon liquidation, the remaining partners would cover the loss on a per capita basis and this could well have the effect of increasing CMS' share of the MCV losses to greater than 50% of MCV's total losses. Referring to the capacity support agreement, the Municipals charge that CMS may incur large annual losses because Consumers Power will have to buy electric energy at prices that may be too high to permit a profit from re-

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[101] State of Michigan Brief at 15, *quoting* 27 FERC at p. 61,184 (emphasis supplied).

[102] *Id., citing* Appendix A, CMS Energy's Annual Report on Form 10K to the Securities and Exchange Commission For The Year Ended December 31, 1988, at 3-4.

[103] *Id., citing* the MCV Application at 25.

sale.[104] Thus, the Municipals state, at the same time Consumers Power gets more than half the benefits from the project, it gets more than half the burdens. In addition, they contend that the cost of MCV itself at approximately $1,600 per kW raises serious questions. By claiming to fix the price at an artificial, historic avoided cost of greater than $1,000 per kW, the Municipals argue that Consumers Power takes on an added burden of purchasing high cost MCV power but receives added profits as a co-owner.

MCV charges that the State is mistaken in its assumption that CMS and its affiliates bear more than 50% of the risk of loss and says even if this were true, it would not be relevant to compliance with the ownership regulations. Stating that the State is mistaken in its understanding of what constitutes "losses" for purposes of determining the stream of benefits, MCV argues that it is the "*entitlement*" to profits, losses and surplus that is relevant. MCV states that such entitlement refers to the allocation of profits, losses and surplus to partners under the terms of the Partnership Agreement and applicable state law and that allocation of partnership losses is a significant component of the stream of benefits because tax losses have economic value to partners.[105]

In contrast, MCV argues that the fact that a party may in the future suffer an actual loss in its own affairs as a result of a qualifying facility not operating profitably or not performing under its contracts is not relevant to the analysis under *Ultrapower 3* and related cases. In that regard, MCV states that while a utility that has contracted to buy power from a qualifying facility may suffer a loss if the qualifying facility is unable to perform, this type of

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[104] Michigan Municipals Protest at 30, *citing* Attachment C, Tice, David W., Less Than Meets the Eye, A Hard Look at CMS Energy's Financials and Earnings, *Barron's*, October 16, 1989 at 15.

[105] MCV Answer to the State Brief at 13.

detriment has never been considered to be relevant to the stream of benefits analysis.

Similarly, MCV contends that the fact that some but not all partners may be obligated to contribute additional capital to the partnership under certain circumstances is not relevant for purposes of the utility ownership determination here. Further, it points out, the fact that Rofan would not have such a deficit make-up obligation was apparent from the partnership agreement filed with the original application. Citing *Ultrapower 3*, MCV argues that it is clear utility affiliates may, without violating the 50% ownership test, hold more than 50% of the aggregate capital accounts and may make contributions to their capital accounts in the future that are in excess of 50% of the aggregate of all contributions.[106] In all such situations, MCV adds, it could be argued that the utility affiliates bear a disproportionate risk of loss since they would not receive a return of their capital if the qualifying facility were not to operate profitably; however, this type of loss is irrelevant to the Commissions' ownership test.

In light of the previous discussion regarding a utility's risk of loss, MCV asserts that the State's argument with respect to the capacity support agreement is irrelevant as a matter of law. Further, MCV states that the State is mistaken as a matter of fact, as the agreement has been terminated, subject to receiving a consent from MCV's bank lenders. MCV explains that it had not included facts relating to the agreement in its recertification application because it is irrelevant and has been rendered moot as a factual matter.

We agree. The termination of the capacity support agreement renders moot the State's argument with regard

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[106] MCV also cites *Beowawe Geothermal Power Company*, 33 FERC ¶ 62,205 (1985) in which it was held that the applicant complied with section 292.206(b) even though future capital contributions might result in the utility affiliate holding more than 50% of the aggregate of all capital accounts. *Id.* at 15.

to any loss that might be suffered by CMS Energy as a consequence of that agreement's operation. Moreover, the fact that CMS Energy, via Consumers Power, could suffer a loss as a consequence of the MCV facility not performing pursuant to contract expectations is of no consequence to this proceeding. As noted at the outset, the scope of this inquiry is narrow. Specifically, the losses with which we are concerned are those incurred by the partnership and how they are allocated to CMS Midland as a partner in MCV. We are not concerned with losses incurred by Consumers Power as a purchaser of power from the facility (just as we are not concerned with losses incurred by Dow as a steam purchaser). As to the partnership losses, we have found that CMS Midland, the electric utility participant in the partnership, is not exposed to more than 49% of the partnership's losses.

Beyond the *Barron's* article, which provides no real explanation, the State does not expand upon its argument that CMS guaranteed certain tax benefits to the non-CMS partners in MCV. Nor can we discern any benefits other than the above-described shift of actual depreciation benefits to those partners where CMS Midland would otherwise receive book depreciation exceeding 50%. (*See* Section III. A. *supra*). Accordingly, we must reject the contention that such "guarantees" constitute assumption by CMS of more than 50% of MCV's risk of loss.

Nor can we find that the alleged subordination of the MDC Notes to the non-CMS partners' target rate of return indicates additional losses accruing to the CMS entities. First, as is the case with the power purchase agreement, any losses that may be incurred by CMS via MDC are separate and apart from any losses incurred by CMS Midland as a participant in the partnership. Simply stated, as of June 2, 1989, the deal was struck and, subject to the purchase price fluctuations established by the Memorandum of Agreement, CMS via MDC was a vendor (of the Net Project assets) having taken back notes of the partnership as consideration for the transfer. The fact

that MCV may or may not be able to meet that debt obligation is irrelevant and any losses incurred as a result of nonpayment are now Consumers Power's affair. Second, as we have previously found, the notes are not subordinated to the non-CMS partners' target rate of return. Rather, the *amount* of the notes, representing the purchase price, was adjusted to achieve meeting that target. However, like any other debt, this obligation must be cleared before any disbursement to the partners, and the obligation is absolute in terms of requiring payment.

The capital account makeup provision does not demonstrate a basis for finding that CMS (through CMS Midland in this instance) will bear more than 50% of any losses flowing from the operation of the partnership. First, in our experience, such arrangements are not atypical of partnerships, except for the partners' agreement to make up the negative capital account balance of another partner. However, we agree with MCV that this provision is not truly relevant to a determination of whether a partner is incurring a loss that may be included within the stream of benefits. We have indeed found that future additional capital contributions by a partner would cause its capital contribution to exceed 50% of the total of such contributions. *See Ultrapower 3*, 27 FERC ¶ 61,094 (1984); *Beowawe Geothermal Power Company*, 33 FERC ¶ 62,205 (1985). The examination here focuses on that which is derived from the partnership, i.e., the stream of benefits. Assuming an equal sharing of benefits in a given situation, if one partner chooses to provide more capital, its effective rate of return on that investment is obviously lower, but that is its business decision to make. As we have noted, the capital contribution conveys no management rights, nor does it influence the distribution of profits or gains. *Ultrapower 3*, 27 FERC at p. 61,184. It is simply that which has been invested in expectation that the agreed-to share of profits or gains will provide the return sought.

c. Other Alleged Benefits

The Michigan Municipals contend that Consumers Power will receive excessive natural gas profits from MCV-related "manipulations" and that this presents another demonstration of benefits to Consumers Power from MCV. Specifically, the Municipals assert that Consumers Power was able to manipulate the gas contracts to allow it to buy gas for its gas distribution system at artificially high prices that could be passed through to its gas ratepayers, while receiving artificially low prices for the gas purchased for MCV. The Municipals also allege that because Consumers Power controls both MCV and its gas distribution business, Consumers Power is able to reap greater profits, which are a benefit flowing from MCV.

According to the Municipals, Consumers Power negotiated the gas purchase contracts for the MCV project in tandem with system gas purchases for the Consumers Power natural gas system, and the contract rates for the MCV are far lower than those contained in the contracts for the Consumers Power system gas. The Municipals point out that the Canadian National Energy Board (Board), in ruling on natural gas exports to both Consumers Power and MCV, was concerned that the rates in the MCV contracts were uneconomic (i.e., too low from the standpoint of Canadian gas producers) and specifically stated that it "is of the view that the proposed sale to MCV would not provide net benefits to Canada if analyzed on a stand alone basis." [107] However, due to the off-setting higher price under the companion Consumers Power system gas contracts, which the parties told the Board were part of a "package deal" with the MCV gas, the Board approved the export of Canadian gas, but required that exports to MCV be limited to the same amount exported to Consumers Power under the higher-priced contracts. In sum, the Municipals allege that Consumers Power used its market power to obtain better rates for MCV to the detriment of its ratepayers.

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[107] Michigan Municipals Protest at 28-29, *quoting* Canterra Energy Ltd. *et al.*, GH-8-88, Reasons For Decision, at 18.

The Municipals also argue that MCV is in reality a Consumers Power power plant and the transfer is void for purposes of the Commission's ownership regulations because, at the time of transfer, the facility was owned by a person primarily engaged in the generation or sale of electric power. Providing a history of the plant up to and including the proposed conversion to a gas-fired cogeneration facility, the Municipals state that after the decision was made, Consumers Power sought to use the Midland combined cycle natural gas facility in 1986 as the proxy for determining avoided cost rates to be paid to qualifying faciilities. By using this plant rather than the coal-fired plant proxy it had been using, the Municipals alleged that Consumers Power hoped to drive down the avoided cost for power as well as capacity payments it would make to future qualifying facilities, thus contradicting its argument that it was PURPA that induced the conversion and that this is not a Consumers Power facility. According to the Municipals, Consumers Power now seeks to take the assets which it owned, under the contracts which it negotiated, and by dealing away a nominal 51% of the ownership, extract higher rates for its electrictiy and evade state and federal regulation.

The Municipals also point out that Consumers Power is not planning a new rate base plant, but plans to rely disproportionately on MCV for new power supplies. They also cite, as further evidence of Consumers Power's alleged motivation to evade regulatory control, the "proposed scheme," at issue in *Palisades Generating Company*, FERC Docket No. ER89-256-000, and *Consumers Power Company*, FERC Docket No. EC89-10-000, to transfer a rate-based nuclear plant to an affiliate and buy back the power at above cost. Thus, they conclude, the assets transferred by Consumers Power to MCV (and proposed to be transferred to Palisades Generating Company) are nothing more than the transfer of Consumers Power plants, and such transfers cannot meet the ownership test of the Commission's regulations because at the

time of transfer they were "owned by a person primarily engaged in the generation or sale of electric power."

Responding to what it characterizes as the Municipals' suggestion that Consumers Power could have completed the gas conversion at Midland as a rate base plant and that MCV's status as a qualifying facility was a device to avoid state rate base regulation, MCV argues that nothing could be further from the truth. MCV states that due to its desperate financial situation in 1984 and 1985, Consumers Power needed extraordinary retail rate relief from the Michigan Commission to avoid bankruptcy, and one condition attached to the grant of such rate relief was that Consumers Power agreed not to spend any money to restart construction at the Midland site.[108]

In addition, the Applicant states that prior approval was necessary before expenditures of any funds to restart construction at Midland could take place. However, Consumers Power was unable to obtain such prior approval for a rate base conversion. Instead, in October 1986, the Michigan Commission did allow the project to proceed, but only if it was a qualifying cogeneration facility, and only if it did not involve a significant commitment of funds as part of the utility's construction program. In other words, if the project could raise the funds as a qualifying facility and complete the conversion, the Michigan Commission had no objection, but it would not grant relief from its earlier condition to permit a rate base project.[109]

MCV also argues that the two primary benefits accorded to qualifying facilities by PURPA, avoided cost pricing and exemption from certain state and federal regulatory

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[108] MCV Answer to the Michigan Municipals Protest at 43, *citing* In re Consumers Power, 66 PUR4th 1, 25 (March 1985) and 68 PUR4th 42, 51, 52 (July 1985).

[109] *Id. citing* In re Consumers Power Company, Case No. U-7830 (Step 3A) *et al.*, slip opinion, October 22, 1986.

burdens, were critical to the resurrection of the abandoned Midland plant, given Consumers Power's inability to complete the plant itself.

In its supplemental brief in support of its motions, the State advances three additional arguments in support of its contention that CMS holds a greater than 50% interest in MCV. Referring to MCV's December 1 supplemental filing containing the exhibits of the Amended and Restated MDC Transfer Agreement, the State points out that according to Table 16 of Exhibit E to that agreement, for a period of time at the beginning of the MCV project, the allocation of profits and losses to CMS was 54.117%. The State argues that this fact should disqualify the MCV as a qualifying facility. At the very least, the State contends that a hearing should be held to determine whether, on a present value basis, CMS' entitlement to profits and losses, when averaged over the three time periods referenced in Exhibit E, exceeds 50%.[110] Finally, although MCV has argued that CMS will take a loss on the notes issued by MCV to MDC, the State argues that MCV fails to indicate that the MDC tax basis in the assets it is exchanging for $1.2 billion to $1.5 billion in notes is only $1.05 billion or 70% of the assets' book value. According to the State, this indicates a profit of at least $150 million.

In its answer to the State's supplemental brief, MCV first responds that while the allocation of losses and profits to CMS Midland was at one time 54.117%, this allocation was reduced to 49% on May 26, 1989, and that this is consistent with the contemplation of the original certification order that CMS Midland's interest in the facility would be reduced to 50% by the initial operation date.

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[110] State of Michigan Supplemental Brief at 4, *citing Prodek/Hydro Resources Joint Venture*, 41 FERC ¶ 61,152 (1987). The three time periods referred to run from the point of admission of the New Partners to the end of the partnership.

MCV argues the State has simply misread Table 16, which indicates that the interest of CMS Midland in MCV profits and losses would be 54.117% from "Pricing Date to Adjustment Date." However, as noted in the application, this percentage was reduced to 49% by the operation of Amendment No. 1 to the partnership agreement. Similarly, MCV argues that the State has misunderstood Table 17, which indicates that CMS Midland receives 54.611% of all book depreciation to be allocated to all partners other than Rofan. After taking account of the Rofan share, however, MCV points out that CMS Midland's share of total depreciation for tax purposes is less than 50%. Finally, regarding the State's argument that CMS Midland's tax basis in the Net Project is such that it will take a profit on the transfer of at least $150 million rather than losses asserted to stem from the lowered purchase price note amount, MCV argues that it is both erroneous and irrelevant. Pointing out that the reason the tax basis is lower than the book basis has to do with the application of the tax laws while the assets were in the hands of Consumers Power, MCV says the tax basis is only useful for determining tax liability upon transfer and is not indicative of a profit or loss in an economic sense. In fact, it points out, a taxable gain is a detriment, not a benefit, to the party recognizing the gain. Moreover, it adds, even if the assets were transferred at a profit, the notes to be issued would not, as previously argued, be construed as part of the stream of benefits.

The record confirms MCV's responses to the first two arguments presented in the State's supplemental brief, as discussed in our examination of the documentation controlling the operation of the partnership agreement. (*Supra*, section III. A.) Further, as we noted in finding that the MDC Notes constitute a debt to the partnership, the New Partners negotiated the agreements premised on their perception of the value of the Net Project assets.

(*Supra*, section III. B.1.a.) It is unlikely that in making their assessment they were unaware of the tax basis of the assets. Moreover, our assessment of the partnership focuses on the situation as it existed on June 2, 1989. At that point the question was whether, other than through its participation in MCV via CMS Midland, Consumers Power could derive benefits as a result of the partnership's operation. As we have found, it could not, since it had executed agreements providing for the transfer of the assets and thereby relinquished the necessary percentage of its right to proceeds from the facility's operation. The fact that it may have derived a gain for tax purposes prior to the facility's production of energy is a separate consideration from the benefits to be derived from the facility at that point and is ultimately irrelevant as a consequence.

We also find irrelevant to this proceeding the allegations regarding potentially excessive gas profits allegedly flowing to Consumers Power as a consequence of transactions which involved MCV to the extent that gas contracts negotiated by Consumers Power favored the facility to the detriment of Consumers Power's gas system customers. It is true that, but for MCV, the gas contracts would not have been structured in this fashion. However, for purposes of our limited analysis of benefits accruing to MCV, any benefit derived as a consequence of the favorable gas pricing is shared among the partners, and must follow the sharing percentages. Thus, CMS Midland, the Consumers Power entity involved in the partnership, receives no additional benefit that would cause its share of the stream of benefits to exceed 50%. In terms of any additional revenues Consumers Power may derive, the fact is that those revenues do not flow to the partnership, and are part of a relationship that is separate and apart from the partnership's business and the revenues derived therefrom. As a result, they have no bearing on the stream of benefits analysis.

With regard to these and other allegations [111] that Consumers Power will obtain profits that it might not otherwise obtain without the existence of MCV, we wish to make the following observations. We do not mean to suggest that by virtue of finding these matters irrelevant to this proceeding that we are casting a blind eye to the situations noted by the intervenors. However, as we have stated, the scope of this inquiry is quite narrow; it is limited to a determination that, under the ownership and technical regulations, the MCV facility may qualify for PURPA benefits. Though we find that some of the allegations are irrelevant to the stream of benefits analysis, that does mean they cannot be addressed. Rather, it is a question of pursuing any potential remedies in another forum. To the extent that Consumers Power may be perceived to have discriminated against retail gas customers to their detriment by favoring MCV, this is certainly a matter which may be pursued before the state commission. Likewise, in proceedings before the Michigan Commission to determine the appropriate avoided costs and capacity allocations for Consumers Power, it appears that allegations not unlike some pressed in this proceeding have been presented for consideration in that Commission's deliberations.[112]

With respect to the Municipals' argument that MCV is actually a Consumers Power rate base plant reconfigured to avoid regulation, and that the transfer is void since the plant was owned by a person primarily engaged in the generation or sale of electric power, we cannot see how the transfer is voided unless the facility were operating at the time of the transfer when Consumers Power owned greater than 50%. However, as we have found,

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[111] *See, e.g., supra* section III. B.1.b. and *infra* section III. C.

[112] *See, e.g.*, Discussion of Consumers Power dealings with MCV that were found by the Michigan Commission not to be at arm's length. *Infra*, section III. C.

documentation effecting the transfer was executed prior to the initial operation; additionally, that documentation indicates that Consumers Power was not an owner entitled to benefits from the operation of the facility on that date, other than through the participation of CMS Midland in a manner that we have found complies with the regulations.

The same reasoning serves to respond to the argument that MCV is a rate base plant. There is no doubt that the facility was originally proposed to be a rate base plant; a fact known to the Commission when it originally certified the facility. However, pursuant to its desire to effect what it freely acknowledges is in effect a salvage operation, and subject to the constraints imposed by the Michigan Commission, Consumers Power via MCV constructed a partnership and facility that complies with the Commission's regulations. The fact that qualifying status will relieve the facility of regulation that Consumers Power might otherwise face were it a part of the utility's rate base is irrelevant. That is a benefit conferred on such facilities by section 210 of PURPA.

2. Control of MCV

Pointing out that the transfer of Consumers Power's assets to MCV, the planning of the gas fueled facility, the beginning of the installation, the contract for sale of the power to Consumers Power, and the purchase of gas all took place while CMS retained more than 49% of the control of MCV, the Municipals contend that what remains to be divided among the general partners is not effective control of MCV, since the decisions affecting MCV's basic operations have been made. As an example of such control, they refer to the facts surrounding negotiation of the power sales contract that led the Michigan Commission to conclude that "Consumers had a dominant, controlling role in the MCV at the time of the

contract negotiations." [113] Further, referring to the application for recertification, the Municipals argue that MCV has admitted that, under the original Partnership Agreement, subsidiaries of Consumers Power were entitled to more than 50% of the economic benefits of the partnership. They argue at the time essential decisions regarding control were made, MCV has admitted that Consumers Power had control.

The Municipals contend further that the control Consumers Power wields over MCV is sufficient to require treating both as a single entity under the alter ego doctrine. The essence of that doctrine is that "a corporation and those who have controlled it without regard to its separate entity are treated as but one entity." [114] They argue that here the degree of personnel overlap, the lack of independent business discretion displayed by a puppet, and the lack of arm's-length dealings are all indicative of the existence of an alter ego.[115] Adding that the goal is to avoid allowing form to triumph over substance, the Municipals assert that Consumers Power has not treated MCV as a separate entity and that it has exercised control over MCV to attempt to avoid federal and state regulations and to reap greater profits than otherwise allowable.

The Municipals cite other examples of looking to the substance of corporate relationships where two entities were treated as one.[116] They state that the Commission cannot accept at face value CMS' assertion of a technical interest of 49% of the equity and control of MCV, as

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[113] Michigan Municipals Protest at 32.

[114] *Id.* at 32, *citing Fisser v. International Bank*, 282 F.2d 331 (2d Cir. 1960).

[115] *Id.* at 33, *citing United States Barite Corp. v. M.V. Harris*, 534 F. Supp. 328, 330 (S.D.N.Y. 1982).

[116] *See, e.g., Allegheny Electric Cooperative*, 47 FERC ¶ 61,015 (1989); *San Diego Gas & Electric Co. v. Alamito Co.*, 38 FERC ¶ 61,241 (1987).

the substance is much different from the form, and it is the substance which must prevail. Stating that the Commission recognized this in the PURPA ownership context in *U.S. Army Corps of Engineers*,[117] the Municipals contend that the instant case presents a similar situation. Specifically, though CMS has sought to place MCV technically within the Commission's guidelines, the Municipals assert that it is merely trying to arrange avoided cost pricing for sales to itself, and then will use its market power to minimize fixed costs to gain greater profit and, through control of transmission and markets, to gain an unfair advantage. They add that the goal of PURPA was not to allow utilities to avoid state regulatory agencies, exploit their monopoly position and engage in self-dealing with the stamp of approval by this Commission. They state that if the Midland assets really had value for cogeneration, then Consumers Power would have completed the conversion anyway, and that the granting of qualifying facility status in this case does not encourage additional construction.

In response to the Municipals' contentions, MCV argues that the Commission has already ruled that the "ownership criteria" of section 292.206 must be satisfied when the qualifying facility enters initial operation — not before. MCV notes that the original certification order contemplated that CMS Midland's interest in MCV would not be reduction below 50% until the initial operation date (which is now established as June 2, 1989) and that the reduction in CMS Midland's equity interest in MCV in fact occurred before then (on May 26, 1989, through Amendment No. 1 to the Partnership Agreement). It states that despite changes in the Partnership Agreement and the financing of the project since March 1987, CMS Midland's equity interest in MCV on or after the initial operation date has remained below 50%.

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[117] 47 FERC ¶ 61,003 (1989).

We agree. The fact is that all of the complained-of transactions preceded the initial operation date when, as we have found, MCV was in compliance with the ownership regulations. Nor can we agree that by virtue of having structured all the salient agreements pertaining to MCV operation prior to effecting the transfer, Consumers Power has denied the other partners effective control. First, this is not atypical, as our experience in reviewing such applications reveals that many developers of qualifying facilities have such things as fuel supply and power purchase contracts in place before seeking equity investors as partners. This ensures that they can attract the capital necessary to proceed with construction or, as here, where construction is commenced or completed, that they may obtain a partial return on their investment if they remain as partners or their entire return where they are selling a "turnkey" facility. Second, the non-CMS general Partners do have control, not merely by virtue of the fact that they have 51% of the management committee voting power, but also by virtue of the fact that that power means they may act to affect MCV business dealings. For example, from our reading of the partnership documentation it is clear that the management committee may act to amend contracts or initiate and execute new contracts. The fact that these agreements may currently establish relationships on a relatively long-term basis does not mean that the management committee cannot opt out of such arrangements. This might constitute a breach of such an agreement but that is beside the point. The fact is that the partnership provides the management committee the opportunity to take such risks, assuming they are acting to further the interest of the partnership. Accordingly, the fact that many of these relationships were established prior to the non-CMS Partners' admission to the partnership does not deny them their share of effective control of partnership affairs.

We further find that the structuring of the relationships between Consumers Power and MCV effective June 2, 1989, refute the Municipals' argument that the "alter ego"

doctrine means that CMS Consumers Power continues to control MCV. As pointed out above with regard to other alleged benefits flowing to Consumers Power as an indirect result of MCV's creation, these are not matters within the scope of this proceeding.

3. Affiliate Contracts

In prior orders, we have indicated that qualifying facility proposals will be scrutinized to determine whether utility transactions with the facility are at arm's length. *See, e.g., Ultrapower 3, 27* FERC at p. 61,184 n. 6; *CMS Midland, Inc.*, 38 FERC at p. 61,827. In fact, the original certification in this case was granted presuming that contracts between the MCV and the utility would be at arm's length. *Id.* However, we also said:

> We would be particularly concerned if the utility were to receive any special advantages as a result of the partnership, such as service contracts with favorable terms or the right to loan money to the partnership at noncommercial interest rates. While we would normally presume such agreements would be at arm's length if control is shared equally by the utility and nonutility interest, we would examine the details of such arrangement if the circumstances warranted.

Id., citing Ultrapower 3, 27 FERC at p. 61,184 n. 6.

The State contends that such an examination is warranted here, since the Michigan Commission has already determined that at least the purchased power agreement between MCV and Consumers Power was the result of self-dealing.[118] The State alleges that CMS has expressed its intention to disregard the Michigan Commission's order (limiting the allocation of qualifying facility power that may be purchased by Consumers Power from MCV and others) and sign up all needed capacity with MCV. The State argues that the Michigan Commission has indi-

[118] State of Michigan Brief at 17, *citing Midland Cogeneration Venture*, U-8871, Opinion and Interim Order, January 31, 1989.

cated that Consumers Power's overwhelming corporate objective is to obtain approval for as much as possible of the MCV capacity now and first priority for an additional 250 megawatts of MCV capacity when more capacity is needed, regardless of the interests of its ratepayers and the policies embodied in PURPA.[119] Pointing to negotiations with qualifying facilities in Michigan, the State says the Michigan Commission found the "regrettable implication that Consumers' self-dealing is responsible for some of the shortcomings in the process." [120]

The State cites one other factor that it argues indicates a lack of arm's-length negotiation, and seeks an opportunity for discovery as to others. Specifically, the State cites the natural gas contract arrangements noted by the Municipals above and says the effect of this gas contract structure is subsidization by utility ratepayers in Michigan of the MCV non-utility affiliate. If given an opportunity to conduct discovery in these proceedings, Michigan states its intention to review the manner in which partnership and financing commitments have been negotiated to discern, for example, how many of the transactions took place while CMS possessed a voting interest in excess of 49% in the project or whether the transactions negotiated prior to June of 1988 constitute arm's-length contracts.

MCV answers that the State is mistaken and, in any event, that the matter is irrelevant to this proceeding. With regard to the State's contention that the power purchase agreement is not arm's length, MCV argues that the matter is presently being litigated before the Michigan Commission, and in appeals taken from such proceedings. Regarding the second point, MCV says the State is not arguing that the power purchase agreement is unduly favorable to Consumers Power (and therefore constitutes

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[119] *Id.* at 19, *citing Midland Cogeneration Venture Limited Partnership* U-8871, Opinion and Order June 22, 1989, slip opinion at p. 20.

[120] *Id.*

a surreptitious device to siphon additional benefits from MCV that should be characterized as part of the "stream of benefits" to the utility-affiliated owner), but that the agreement is unduly favorable to MCV. MCV argues that this is the reverse of the situation with which the Commission expressed concern in *Ultrapower 3* and the original certification order of the Midland facility, i.e., this involves payment *to* a facility which may favor the facility as a whole, as opposed to payments *by* a facility that may favor an affiliate of a utility owner. MCV asserts that whether a power purchase agreement is unduly favorable *to the qualifying facility* is not relevant to the determination of compliance with the Commission's ownership regulations. MCV states that any argument that a purchasing utility has agreed to pay an amount in excess of its avoided cost at the time the agreement was entered into is appropriately directed to the state commission. It states the same is true with respect to the allegation that Consumers Power entered into imprudent gas supply agreements favoring MCV.

MCV also asserts that the argument that the power purchase agreement was negotiated at a time when CMS Midland was more than a 50% partner in MCV is irrelevant to compliance with section 292.206(b). MCV points out that the original certification order contemplated that CMS Midland's interest in MCV would not be reduced to below 50% until the initial operation date. It avers that the initial operation date obviously follows the period during which the basic project contracts, including the power purchase agreement, would be entered into. The relevant inquiry is whether utility-affiliated equity interests are now more than 50% of the total equity interests and whether the contracts to which MCV is a party provide to a utility affiliate any hidden value that should be taken into account as part of the stream of benefits, according to MCV. It concludes that the State has not alleged that the power purchase agreement provides any such hidden value to CMS Midland.

In our view, the State is viewing this issue from the wrong side of the fence. The State is correct in noting our concern with affiliate contracts in the earlier phase of this proceeding. However, our concern was directed to *situations* where the partnership would be paying for services rendered to the partnership by a utility partner's affiliate, where the agreement favored the affiliate through such means as above-market pricing for those services. In that context, assuming a partnership otherwise structured to provide the utility partner with close to 50% of the stream of benefits, it is conceivable that, taken as a whole, the utility and its affiliate may be viewed as taking more than 50% of the stream of benefits. In other words, to the extent the affiliate contract provided revenues above the level that would be reached pursuant to arm's-length dealing, that differential could be viewed as an additional benefit flowing to the utility that would bring its total interest in the stream of benefits above 50%.

The above concern is not present in this case. Here we are dealing with benefits flowing from the utility to the partnership in payment for the provision of electric power to the utility or the provision to MCV of natural gas at prices that may (or may not) be below what should otherwise obtain. Any benefit obtained by MCV as a consequence of what may be nonarm's-length dealings is shared by all the partners pursuant to the sharing percentages they negotiated and obtained, and which ultimately caused CMS Midland's share to be below 50%. Thus, we cannot find that these contract arrangements are of the type that may be "hidden benefit." Moreover, as we have previously indicated, there are other forums in which these parties may pursue remedies for the alleged wrongdoings.

Nor do we find the reiteration of the Net Project asset argument persuasive on this point. As we have found, the non-CMS Partners negotiated an arrangement with Consumers Power MDC that reflects their view of those assets' value in the market (*see section* III. B.1.a. *supra*).

The agreement reached in fact reflected concessions on the part of Consumers Power MDC, and the transaction was in place on the initial operation date. Viewed in this light, we cannot say that there is an ongoing affiliate contract relationship favoring the utility partner in MCV.

C. *The Non-CMS Co-Owners' Utility Status*

The Michigan Municipals also contend that even if CMS were to own only 49% of the partnership, MCV may be a utility because electric sales by independent power producers (IPP's) affiliated with several other MCV partners make it likely that more than 50% of the equity interest in MCV is owned by an electric utility or electric utility holding company. Adding that MCV itself is selling electricity to Dow at retail in three counties,[121] the Municipals argue that, at minimum, a hearing and discovery is necessary to explore this issue.

According to the Municipals, the parents or affiliates of several of the partners in MCV are engaged, or are likely to be engaged, in the sale of electric energy from nonqualifying industrial facilities. This would make the parents electric utilities under section 3(22) of the FPA [122] if they are making the sales; or electric utility holding companies as defined in section 292.202 of the Commission's regulations [123] if the subsidiary or affiliate

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[121] While acknowledging that the Commission has held that the question of retail sales by qualifying facilities should be left to the states, the Municipals contend that MCV's filing seeks to have the FERC place qualifying facility status on these retail sales, thus placing them beyond the reach of the Michigan Commission. The Municipals also state that the desire of MCV to enter into retail sales further indicates that MCV is essentially a Consumers Power generating plant and that even if MCV were able to become certified as a qualifying facility, FERC does not have the power to approve an arrangement calling for retail sales where such sales are designed to avoid state regulation.

[122] 16 U.S.C. § 796(22) (1988).

[123] 18 C.F.R. § 292.202(n) (1989).

is making the sales. They allege that the parents of three of the MCV partners, Dow, Fluor Corporation, and the Coastal Corporation, have or are likely to have facilities where electric power is generated or sold from nonqualifying facilities.

For example, the Municipals assert Dow is in an industry that is naturally well adapted to electric generation and cogeneration, because the chemical processes that are its business require large amounts of steam and electricity and run essentially 24 hours per day, 365 days per year. As a result, Dow for many years has owned and operated its own electric generation and cogeneration facilities. Several of Dow's current electric generation facilities are not qualifying facilities and allegedly are likely to meet the FPA definition of electric utility because Dow sells power back to the area utility, and may provide power to other companies, whether or not affiliated with Dow. For example, FERC Form 1's for Houston Lighting & Power Company for 1985 through 1988 show purchases of over 300 MW of power from Dow, but the "relevant indices" (unexplained) reveal no FERC order certifying a qualifying facility for Dow at that location. Similarly, Consumers Power's annual report to the Michigan Commission (the Michigan version of the FERC Form 1) for 1986 and 1987 contains lines for purchases from "Dow Chemical Company Ludington" although indicating that few (and in 1987, no) transactions occurred in those years, and again, the "indices" reveal no FERC order certifying a qualifying facility for Dow at that location. Likewise, Dow has approximately 250 MW of generation at its Midland, Michigan facilities which predate PURPA. Dow currently purchases 50-70 MW of power from Consumers Power to supplement this generation, but it is quite likely that at times power is delivered from the Dow generators back to Consumers Power.

The Municipals contend that these activities are one aspect of the more general issue of frequent sales of electric power at wholesale to the area electric utility by in-

dustrial facilities. There are several cases in which the Commission has ruled in general that the section 205 of the FPA,[124] which requires all rates and charges for wholesale sales to be approved by the Commission, cannot be waived.[125] Asserting that these cases appear to touch on the "tip of the iceberg," since the pleadings in some of the cases indicate there are probably hundreds of similar situations, the Municipals argue that Dow's activities and those of Coastal, Fluor or other MCV partners, may fall squarely within this category. They state that regardless of whether FPA-required approval has been otbained, the seller would be an electric utility under that Act.

The Municipals also argue that the provisions in the MCV power sales agreement with Consumers Power that allow retail electric power from the MCV facility to be sold to unspecified parties, particularly such sales to Dow or its affiliates in a three-county area, make MCV a utility under section 3(22) of the FPA. Citing the *Union Carbide* cases,[126] they argue that MCV has not claimed that its provision of power at retail would make the recipient a part of the qualifying facility, presumably because it would utterly fail the tests set forth in those cases by the Commission. Further, as a result of this relationship, the Municipals charge that Consumers Power "is cream skimming" *itself* by picking its highload factor customers for deregulated sales of power.[127]

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[124] 16 U.S.C. § 824d (1988).

[125] Michigan Municipals' Protest at 42, *citing St. Joe Minerals Corporation*, 21 FERC ¶ 61,323 (1982), *order on reh'g*, 22 FERC ¶ 61,211 (1983); *Cliffs Electric Service Company*, 32 FERC ¶ 61,372 (1985); *Orange and Rockland Utilities*, 42 FERC ¶ 61,012 (1988).

[126] *Union Carbide Corporation and Fina Oil and Chemical Company*, 40 FERC ¶ 61,337 (1987), *reh'g denied*, 41 FERC ¶ 61,348, *remanded Gulf States Utilities v. FERC*, 872 F.2d 487 (D.C. Cir. 1989), *order on remand*, 48 FERC ¶ 61,130, *reh'g denied*, 49 FERC ¶ 61,209 (1989).

[127] Michigan Municipals Protest at 43.

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The Municipals also refer to *P.R.I. Energy Systems Inc.*,[128] where the Commission held that retail sales by a qualifying facility merely subject the facility to *state* commission jurisdiction and does not make it an "electric utility." Here, they argue, the extreme nature of MCV's provision for retail sales argues for a qualification of this decision and a finding that MCV is an electric utility.

The Municipals also state Coastal's refineries are prime candidates for electric generation and cogeneration because (like the Dow plants) they use large amounts of steam and electricity and operate 24 hours per day; several of the Coastal facilities appear to have generated electric power for some time and likely have provided such power at wholesale from time to time; and there is no showing that any of the generating facilities in question at the time were qualifying facilities. Similarly, noting that Fluor is a large engineering and construction company focusing heavily on energy projects, including a role as a participant in proposed IPP ventures such as the Thousand Springs Project, the Municipals assert that such activities would make Fluor an electric utility or an electric utility holding company.

In response, MCV argues that the fact that MCV will deliver electricity to Dow is irrelevant to MCV's status as a qualifying facility. MCV also notes this is not a new fact, as the situation was known at the time of the initial certification. Citing *PRI* and another instance where the Commission has rejected similar claims with respect to detail sales,[129] MCV points out that the Municipals have acknowledged twice that the Commission has found that retail sales are irrelevant to a facility's qualifying status, yet suggest that an investigation is necessary because the

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[128] 26 FERC ¶ 61,177 (1984).

[129] *See York Canyon Cogeneration Associates*, 44 FERC ¶ 61,101 (1988).

retail electric contract with Dow covers a three-county area and the extreme nature of MCV's provisions for retail sales argues for a qualification of the *PRI* decision. In response, MCV says the Municipals never explain the basis for the "three-county" allegation. MCV states it is irrelevant to the certification process and, that in fact, MCV will deliver electricity to Dow only in Midland County, Michigan. Moreover, MCV states, there is nothing unusual about provisions in a power sales agreement that permit sales by a qualifying facility such as MCV to parties other than the purchasing utility, and the fact that MCV may make sales to one or several nonutility purchasers is irrelevant to the certification process.

MCV states that it is improper for the Municipals to attempt to place upon the Commission or MCV the burden of proving a negative, i.e., that none of the non-CMS Partners or their affiliates is engaged in an activity that would make it an electric utility or an electric utility holding company. Pointing out that it seeks recertification based upon its representation that none of the non-CMS Partners is an electric utility, a subsidiary of an electric utility, or an electric utility holding company, MCV says it is not appropriate to permit the Municipals to disrupt the recertification process by demanding an investigation into the activities of the non-CMS Partners and their affiliates based upon speculation that one or more of them "is likely" to generate and sell electricity from nonqualifying facilities. Therefore, MCV states that it will not attempt to identify every sale of electricity by the non-CMS Partners or their affiliates and establish that the source of such sale is a qualifying facility. Rather, it argues, if the Municipals or any other interested person believes that, by virtue of sales of electricity by the non-CMS Partners or their affiliates, such partner is a subsidiary of an electric utility or electric utility holding company, that such person may request the Commission to exercise its power

under section 292.207(d)(1)[130] to revoke qualifying status.

MCV does respond to the Municipals' specific references to three purported sales of electricity from non-qualifying facilities, contending they are mistaken in all three cases. With respect to the HL&P purchasers, MCV says all such sales have been made from Dow's qualifying cogeneration facility in Freeport, Texas and notes that notices of qualifying status for this facility were filed with the Commission on November 18, 1981 and May 8, 1982. With regard to Ludington, MCV says it is not aware that Dow sold power to Consumers Power at Ludington in 1986, but that even if this allegation were true, it is irrelevant to whether Rofan is a subsidiary of an electric utility or an electric utility holding company in 1989 and thereafter. MCV states that the sales of power by Dow from its Midland facility are based solely on information that Dow has approximately 250 MW of generation at Midland, from which the Municipals conclude that it is quite likely that at times power is delivered from the Dow generators back to Consumers Power. MCV states that Dow has never sold power to Consumers Power from its Midland, Michigan facilities.

MCV also states that even if a non-CMS Partner should in the future become a subsidiary of an electric utility or an electric utility holding company, this would not affect compliance, because protective provisions in the Partnership Agreement would automatically reduce to zero the equity interest of the non-CMS Partner if such partner should become an electric utility. Thus, even if these allegations were true, no investigation or hearing is warranted, according to MCV.

We find that the Municipals have presented nothing more than purely speculation. Moreover, in their one attempt to provide support, they are specifically refuted by

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[130] 18 C.F.R. § 292.207(d)(1) (1989).

MCV. Specifically, MCV states that Dow's Freeport, Texas facility is being operated as a qualifying facility and that the Midland plant has never sold power to Consumers Power. We shall accept MCV's representations with regard to both of these facilities. The Texas facility is the subject of a notice of qualification, and the Municipals have presented nothing to convince us that the situation is otherwise. In fact, the weight to be accorded their claim in this instance is seriously diminished by the fact that they allege that none of the "relevant indices" indicate that power sold to HL&P by Dow came from a qualifying facility and yet, as MCV points out, there is a notice of qualification on file with this Commission which is a matter of public record.

The generating facilities at the Dow Ludington plant are also the subject of a notice of qualification.[131] Moreover, in proceedings in which the Michigan Commission rendered its June 22, 1989 opinion dealing with avoided cost rates and capacity allocations, which is presented for the record as Attachment D to the Municipals' initial protest, the Dow Ludington plant is one of the applicants.[132] It would not be an applicant were it not for the fact it considered the facility to have qualifying status under the statute and the Commission's regulations. In view of these circumstances we cannot attach any weight to what we already view as speculation.

We do take note of the Municipals' reference to Consumers Power's annual report to the Michigan Commission indicating the slight possibility of sales from the Ludington facility to Consumers Power in 1986. However, MCV has asserted that that was not the case, and even if it were, it is not relevant to the question of

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[131] The Dow Chemical Company, Docket No. QF88-441-000, Notice of Qualification of a Cogeneration Facility Pursuant to 18 C.F.R. [§] 292.207(a) (June 17, 1988).

[132] *See, e.g.*, Michigan Municipals Protest, Attachment D, opinion cover page 5.

whether Dow was an electric utility or electric utility holding company in 1989. Though we do not take lightly an assertion that an entity may have crossed the FPA jurisdictional line without making the required filings with the Commission, the fact is that there is no indication of jurisdictional sales in 1988 before the MCV's initial operation date, and soon thereafter Dow filed a notice of qualification with respect to that facility. Thus, at best, we may have a past infraction of the FPA's requirements. For the relevant periods, however, we have no indication that Dow acted in a manner that would cause us to view it as an electric utility or electric utility holding company.

The Municipals' argument that retail sales from MCV to Dow in a three-county area causes it to be an electric utility is circular. We do not understand what an allegedly wide geographic area has to with the issue. More importantly, however, we have addressed the issue of retail sales in *PRI Energy Systems* and other cases. In fact, we have found that an electric distribution system powered solely by a cogeneration facility is not barred from owning the facility, since it is not primarily engaged in the generation or sale of electric power from facilities other than cogeneration facilities. *See Lawrence Park Heat, Light and Power Company*, 25 FERC ¶ 61,315 (1983). That is the point here: retail sales to Dow notwithstanding, MCV's sole basis of production is from a cogeneration facility. Moreover, we will not narrow our view stated in *PRI* with respect to retail sales based on the alleged extreme nature of the circumstances. As we have explained, section 210(a) of PURPA [133] limits our authority to authorize qualifying facilities to make any sale for purposes other than resale, and the PURPA Conference Report indicates Congress' intention that this is not meant to limit the States' authority with respect to retail sales. *Alcon (Puerto Rico), Inc.*, 38 FERC ¶ 61,042, at p. 61,121 n. 8 (1987).

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[133] 16 U.S.C. § 824a-3(a) (1988).

The Municipals' attempt to invoke the *Union Carbide* cases is inapposite. In fact, as they point out, MCV has not indicated that it proposes that the electric sales to Dow would qualify Dow as a recipient of qualifying facility benefits. Likewise, we will not delve into the Municipals' argument that the sales of electricity to Dow constitute "cream skimming." Unlike the *Union Carbide* situation, the applicant here is not seeking to include a transfer of electricity to another as part of a facility's internal workings; MCV will simply be making retail sales to Dow and no more. As we have stated elsewhere, these arguments are more appropriately pursued in another forum.

Finally, in the event that a non-CMS Partner may hereafter be found to be an electric utility or electric utility holding company, its interest in MCV will be reduced to zero.

D. *Antitrust Considerations*

The Municipals assert that since MCV is being used by Consumers Power contrary to antitrust law and policy, MCV is not entitled to waivers of PURPA requirements. Stating the Michigan Commission has found that Consumers Power favored purchasing power from MCV as opposed to other cogeneration or independent generation to the detriment of its customers, Municipals charge that, as a result of its size, obtained through the possession of retail monopoly franchises and control of transmission, Consumers Power has the economic power to block non-favored suppliers from markets.[134] They contend that Consumers Power has acted contrary to antitrust law and policy in using its economic power to freeze out competing generation and in denying intervenors opportunities to invest in Michigan's transmission grid.

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[134] Michigan Municipals Protests at 45, *citing Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

The Municipals cite numerous court decisions providing that the Commission must take into account antitrust impacts of all of its actions and, wherever possible, harmonize its decisions with the policies of the antitrust laws.[135] They also point out that section 4 of PURPA [136] expressly maintains in force all antitrust acts. Given that Consumers Power's ability to control the terms and conditions of generation availability and access to markets is directly relevant to the extent of Consumers Power's control, they contend that the Commission must take into account Consumers Power's market power in determining whether MCV is utility property or whether it is subject to PURPA treatment. Further, they argue, since Consumers Power has used its monopoly position and market power to benefit MCV with favorable gas supply and transportation contracts not available to other parties, as well as a more favorable power purchase contract than offered to other interested qualifying facilities, to the extent MCV markets power to anyone other than Consumers Power, it will have a competitive advantage against other suppliers who have not benefitted from such control and ownership. They also argue that MCV (and Palisades Generating Company) have been given transmission rights which, in the future, may prevent the wheeling of power for wholesale customers of Consumers Power.

MCV disputes the contentions that Consumers Power has extended preferential treatment to MCV to the detriment of the Consumers Power's customers. Beginning with the allegation that Consumers Power has sought to make disporportionate purchases of capacity from MCV,

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[135] *Id. citing Gulf States Utilities Co. v. FPC*, 411 U.S. 747 (1973); *Denver and Rio Grande Western RR Co. v. United States*, 387 U.S. 485 (1967); *FMC v. Svenska Amerika Linien*, 390 U.S. 238, 245, n. 4 (1968); *Northern Pac. Ry Co. v. United States*, 356 U.S. 1, 4 (1958). ("The Sherman Act was designed to be a comprehensive charter of economic liberty.")

[136] 16 U.S.C. § 2603 (1988).

and therefore disadvantaged the development of other qualifying facilities, MCV argues that the Municipals never explain the relevance of this self-dealing allegation to the ownership issue. With regard to the charge that it has benefitted from alleged self-dealing by Consumers Power or preferential treatment from Consumers Power, MCV reiterates that these issues are being raised before the Michigan Commission in Case U-8871 and appeals taken from that proceeding. Therefore, MCV argues that these issues are beyond the legitimate scope of this inquiry. Referring to the dispute over capacity in the state proceeding, MCV states that it is difficult to imagine that this Commission would ever entertain an inquiry in the context of certification into whether Consumers Power's assessment of its own capacity needs is more correct and should replace the Michigan Commission's findings; yet that is the gravamen of accepting the Municipal's allegations and setting the matter for hearing. Adding that this Commission has always attempted to avoid "the futile duplication of two authorities over the same subject matter," MCV argues that there is no justification for the Commission to expand the scope of inquiry regarding MCV's recertification application to explore issues involving Consumers Power that the Michigan Commission is still reviewing and which are irrelevant to any issues properly before the Commission at this time.

While we are concerned with allegations of market power, as noted above, the scope of this proceeding is narrow. The jurisdiction given the Commission under PURPA section 201 is limited. It gives us no discretion to deny an application for qualifying status on antitrust grounds. Rather, we inquire only whether the facility meets the statutory and regulatory requirements for qualifying status. We do not suggest, however, that we can ignore allegations of anticompetitive activity. We only note this is not the proper proceeding to address these claims.

IV. The Operating and Efficiency Standards

Section 3(18)(B)(i) of the Federal Power Act provides that a "qualifying cogeneration facility" is a cogeneration facility that

> the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and efficiency) as the Commission may, by rule, prescribe.

16 U.S.C. § 3(18)(B)(i) (1988).

The regulations implementing this provision for topping-cycle cogeneration facilities, like the Midland facility, provide:

> (a) Operating and efficiency standards for topping-cycle facilities —
>
> (1) Operating standard. For any topping-cycle cogeneration facility, the useful thermal energy output of the facility must, during any calendar year period, be no less than 5% of the total energy output.
>
> (2) Efficiency standard. (i) For any topping-cycle cogeneration facility for which any of the energy input is natural gas or oil, and the installation of which began on or after March 13, 1980, the useful power output of the facility plus one-half the useful thermal energy output, during any calendar year period must:
>
> (A) Subject to paragraph (a)(2)(i)(B) of this section be no less than 42.5% of the total energy input of natural gas and oil to the facility; or
>
> (B) If the useful thermal energy output is less than 15% of the total energy output of the facility, be no less than 45% of the total energy input of natural gas and oil to the facility.

(ii) For any topping-cycle cogeneration facility not subject to paragraph (a)(2)(i) of this section there is no efficiency standard.

A. *The Operating Standard*

The State requests an opportunity to conduct discovery with respect to MCV's compliance with the operating standard. While indicating it has not had an opportunity to verify or reject the operating standard representations in the recertification application, it does claim that: (1) the request for waiver of the operating standard in calendar 1989 is inappropriate; and (2) the useful power output of the facility for purposes of calculating the facility's operating standard is also inappropriate. With regard to the latter, the State notes that, according to the MCV application, the efficiency standards under all the different configurations will barely exceed the required 45%. Thus, at the very least, the Commission should disregard the use of nonqualifying facility assets in calculating a proposed qualifying facility's operating characteristics and should investigate to determine the veracity of the underlying figures and assumptions, according to the State.

MCV responds that in the original (1987) application regarding this facility it indicated that, in calculating useful power output for purposes of operating and efficiency standard calculations, the useful power output of the Dow back-pressure turbine is added to the useful power output of the facility. Thus, it argues that the role of Dow's back-pressure turbine in the qualification of the facility was fully considered and it is not appropriate to revisit this issue in connection with the recertification application.

MCV has admitted that the facility did not satisfy the operating (and efficiency) standard during calendar year 1989 and has, accordingly, requested waiver. The waiver request is discussed *infra*. However, we disagree with the

State's suggestion that by requesting waiver, MCV's assertion that the facility will meet the operating standard (and the efficiency standard) for calendar year 1990 and beyond has somehow become suspect. Moreover, accepting the State's argument would penalize MCV for acknowledging its failure and thus create a disincentive for appraising the Commission of relevant information.

With respect to the State's argument that, in calculating useful power output for purposes of the technical standard calculations, the useful power output of the Dow backpressure turbine should not be included, we agree with the Applicant that this issue was fully considered when the Commission granted the original application. Moreover, the Commission's regulations define "useful power output" of a cogeneration facility as "the electric or mechanical energy made available for use, exclusive of any such energy used in the power production process." 18 C.F.R. § 292.202(g) (1989).[137] Nothing in the Commission's regulations precludes utilizing associated mechanical and electrical outputs that are not part of the cogeneration facility. In fact, PURPA and the Commission's regulations, in defining what constitutes a valid cogeneration facility, require sequential production of power and useful thermal output from the same fuel source, since the sequentiality is the cause of the fuel efficiency resulting from cogeneration.[138] Such fuel efficiencies need not be limited to fuel savings from new facilities, i.e., the elimination of boilers supplying existing industrial generation by replacing the existing facilities with cogeneration facilities still produces fuel savings.

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[137] Examples of energy for power production process include: steam used for deaeration, feedwater heating, fuel preparation, etc. *See Electrodyne Research Corporation* (Gilberton, Pennsylvania), 32 FERC ¶ 61,102, at p. 61,279 (1985).

[138] *See* 16 U.S.C. § 3(18)(A) (1988); 18 C.F.R. § 292.202(c) (1989).

Such an arrangement will produce useful thermal output, as long as the steam is used sequentially for useful thermal purposes and will thus satisfy the definition of a cogeneration facility.

B. *The Efficiency Standard*

The Municipals argue that the MCV application fails to account for a number of factors that will lower the efficiency figures and bring the final number below the marginal numbers presented in the application. Moreover, they argue that the information contained in the filing is inadequate to allow the calculations to be verified, *e.g.*, the natural gas thermal input values used in sections 6.2.2, 6.3.1.2, and 6.3.2.2 of the application are not supported in the filing. The Municipals also present the affidavit of a mechanical engineer to demonstrate that the margin by which the Midland facility would meet the efficiency standard is very small, even under MCV's own calculations. In addition, they contend that the efficiency percentage computations in the application assume a higher efficiency than the manufacturer's published efficiency data for the type of gas turbines being used by the MCV project and state that this apparent deviation has not been explained. In fact, using the manufacturer's data, they say it is unlikely that the MCV project will meet the 45% efficiency standard with 100% utilization of Unit 2 and unlikely that the standard will be met assuming 10% utilization of Unit 2.

Among the factors allegedly unaccounted for, the Municipals state that there will be degradation of gas turbine performance over time, which will involve at least a 3% loss in power and a 2% increase in heat rate over a five-year period. They maintain that there is no indication in the application of how the marginal compliance with the efficiency standard will be maintained after initial startup.

The Municipals also question Dow's use of the steam provided by MCV based upon the lack of such information in the application and the fact that while Dow operates industrial facilities and agrees to purchase the steam, to consider the steam to be used for industrial, commercial, heating, or cooling purposes under section 292.202(c) of the regulations [139] the steam must actually be used to perform useful work for which energy would have otherwise been expended.[140]

The Municipals also dispute the factual accuracy of the MCV's apparent claim that virtually all of the heat reduction down to 60 degrees is useful thermal energy output. Further, they state, the application does not appear to account for thermal losses. Thus, they add, unless it is assumed there is no heat loss in the transfer of MCV steam to Dow plants, including the transportation of steam during the winter under the river separating the MCV facility from the Dow plant, the Commission's efficiency tests are not met.

Other factual issues raised by the Municipals include: (1) MCV's failure to address the impact of its estimated project capacity factor upon efficiency; [141] (2) it is pos-

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[139] 18 C.F.R. § 292.202(c) (1989).

[140] Michigan Municipals Protest at 52, *citing LaJet Energy Co.*, 43 FERC ¶ 61,288 (1988); *Electrodyne Research Corp.*, 32 FERC ¶ 61,102 (1985).

[141] The application indicates a net electric power production of 1390 MW, and that the project will operate at a 75% capacity factor, or an average of about 1042 MW. According to the Municipals, there is no explanation as to whether this less than full output will be the result of: 1) operating only nine of the twelve gas turbines at full load; 2) operating all twelve units at 75% load; or 3) operating all units at full load part of each day (on-peak) and shutting down some of the units at night (off-peak). Arguing that each of these three possibilities makes it less likely the efficiency computations in the application are accurate or that MCV will meet the required efficiency standards, they state that if turbine

sible that Dow may have seasonal fluctuations in its level of requirements, or may have a labor strike, or may be affected by general slowdowns in the national economy, and MCV has failed to explain how it will meet the cogeneration requirements if Dow slows down operations and requires less steam for a period of time for any reason; (3) the application indicates that six of the HRSG's can be fired supplementally, but there are no calculations demonstrating the efficiency of the plant when these are fired; and (4) inclusion of the Dow back pressure turbine in the useful power output is improper, because the Dow turbine is not part of the MCV project and thus is not part of the facility for which QF certification is being sought. They maintain that the turbine was expressly excluded from the initial certification.

In response, MCV states that the Municipals' speculation about factors that will allegedly lower the efficiency computations do not warrant a hearing as they are simply wrong or irrelevant. Moreover, MCV adds, all of the issues raised by the Municipals are of the type that have been routinely addressed by the Commission in the course of numerous certification proceedings.[142]

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usage is rotated so that only nine of the twelve turbines are operated at any one time, the efficiency standard computations fail to take into account the extra fuel needed to start and restart "cold" machines. The use of extra fuel will increase the overall heat rate and reduce efficiency. If all twelve units are operated at 75% of full load, they are less efficient with a higher heat rate. This is not reflected in the efficiency percentage computations, the Municipals add. Further, if the MCV project is operated as a "peaker," they contend that the efficiency percentage computations fail to take into account the extra fuel needed to start and restart "cold machines," and, under each of these alternatives, it can be expected that the efficiency of the MCV project will be less than that postulated by MCV in the application.

[142] MCV Answer to Michigan Municipals Protest at 25, *citing York Canyon Cogeneration Associates*, 44 FERC ¶ 61,101 (1988).

In fact, MCV argues, none of the assertions made by the Municipals other than a question concerning the Unit 2 steam turbine generator has any relevance to the change in the facility upon which MCV seeks recertification. Thus, the proper time to have raised these questions was three years ago in connection with the original certification; not now, as the project is nearing completion in reliance upon the Commission's 1987 order.

With respect to the Unit 2 turbine, MCV says the Municipals incorrectly assert that at 100% utilization, an increase of only 1.4% in an energy input will cause the facility's efficiency to fall below 45%. The Municipals ignore the fact that a significant characteristic of a combined-cycle facility is the sequential use of energy. An increase in the energy input to the plant of 1.4%, even without a corresponding increase in electric output from the combustion turbines, will result in a substantial increase in the waste heat input to the heat recovery steam generators, leading to increased steam production, and finally, an increase in steam turbine electric output. Consequently, according to MCV, the Municipals' hypothetical increase of 1.4% in energy input will result in an efficiency percentage still in excess of 45%.

In answer to the assertion that the gas turbine efficiency data used in the application deviate from the manufacturer's efficiency standards, MCV says the data it relied upon are fully consistent with the manufacturer's data. MCV contends that the project will continue to meet the efficiency standard after initial startup, notwithstanding equipment degradation. It says the Municipals fail to take into account a variety of features the facility will employ that will minimize the effect of any equipment degradation, *e.g.*, the fact that the twelve MCV combustion turbines are equipped with both online and offline compressor cleaning systems to minimize degradation of capability and heat rate. Additionally, MCV says that the 3% loss of combustion turbine output postulated

by the Municipals is inconsequential because of the design and operation of the MCV project.[143]

MCV also argues that the Municipals are wrong when they suggest that the efficiency standard computations are based upon improper fuel usage assumptions, and that the use of proper assumptions will make it less likely that the MCV project will meet the efficiency standard. Stating that the fuel consumption assumptions used in the computations relating to Unit 1 and Unit 2 are consistent and correct, and both computations assume continuous operation at 75% capacity, MCV points out that, since Unit 2 is less efficient than Unit 1, and has different "part load" characteristics, MCV effectively has less capacity when Unit 2 is in service.

With respect to Dow steam usage, MCV says the Municipals incorrectly assert that the application does not explain what Dow will do with the steam, i.e., various chemical manufacturing processes and plant heating. Moreover, it points out that Dow is obligated by contract to apply a specified minimum amount of the steam provided to a thermal use that will qualify such steam as "useful thermal energy output" under the Commission's regulations. With regard to the Municipals' speculation about potential lowering of Dow's steam demand, MCV states that it has no burden of demonstrating that the facility will meet the technical standards in every conceivable contingency. Moreover, as noted above, Dow is

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[143] MCV states that the following design and operation factors will mitigate loss of combustion turbine output: (1) capability can be fully restored during unit overhauls and with 12 total units on a rotating overhaul schedule, only a few will be at maximum degradation at any time; (2) plant output can be increased by supplemental firing of the HRSG to generate additional steam, which can be expanded through a steam turbine or injected into the combustion turbine to increase electrical output; and (3) the combustion turbines are capable of overfiring, i.e., operation at power output exceeding rated output.

obligated by contract to apply a sufficient quantity of the steam provided to a thermal use that will enable the facility to meet the criteria for a qualifying cogeneration facility. MCV also avers that thermal losses for the process steam system have been calculated, and were determined to be insignificant.

In response to the Municipals' argument about "cold starting," MCV says the amount of additional fuel required will be negligible and will not affect the MCV project's ability to meet the efficiency standard. In addition, it points out that the facility will continue to meet the technical standards even if supplemental firing is performed because supplemental firing capability was installed to provide a means to meet peak process steam demand without adversely affecting the plant electric generation capacity, although supplemental firing of the HRSGs is intended to be used mainly during periods of very high process steam demand. In regard to the Municipals' argument about the Dow back-pressure turbine, MCV adds that eliminating the output of the turbine generator from the total energy output of the plant does not prevent the plant from attaining the required efficiency percentage.

The intervenors raise essentially seven arguments in support of their assertion that the MCV facility fails the efficiency standard.

First, they argue that the facility, at best, marginally meets the efficiency standard. For example, the Michigan Municipals assert that if fuel input is increased by only 1.4%, the facility will fail to meet the minimum 45% efficiency standard. However, the Commission regulations require only that a cogeneration facility meet a minimum efficiency standard of 45% when the operating ratio value is below 15%; if the operating ratio value is equal to or above 15%, the regulations require a minimum efficiency standard of 42.5%. Based upon the information

provided in the application, the facility will meet the efficiency standard under any of the various contemplated operating configurations. Any assumed increase in fuel input, as alleged, will have a corresponding increase in electric power output and steam output that must also be considered. We find that the facility will continue to meet the efficiency standard even assuming such higher level of fuel input.

Second, the Municipals assert that the Applicant has failed to account for a number of factors that allegedly will reduce the efficiency calculation: (a) due to degradation of the gas turbines (assuming a 3% power loss and 2% increase in heat rate over a five-year period), it is unlikely the facility will meet the efficiency standard over its operating life; (b) if Dow's steam requirement is reduced due to strikes or as a result of market conditions, the facility will not continue to meet the technical requirements.

As to the Municipals' first argument, we note that the gas turbine generators are equipped with both online and offline compressor cleaning systems to minimize any degradation in performance. In addition, the units will be rotated so that overhaul of the units can take place in order to minimize degradation and breakdown during operation. During an overhaul, some of the units remaining in service may be injected with steam to increase the electric power out of these units. In addition, heat recovery boilers may be supplementarily fired for production of additional steam for injection into the steam turbine generator which will also increase the electric power output. Given these facts, we conclude that the anticipated [144] net electric power output as reflected in the heat rate will be maintained.

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[144] Intervenors suggest a level of precision not obtainable until after the fact.

As to the second argument, Dow is obligated by contract to purchase a minimum amount of steam in any calendar year and to use such steam for "useful" thermal applications. Cogenerators generally base their calculations of the operating and efficiency values on conservative assumptions of the factors involved, in order to ensure the facilities will meet the requirements of our regulations under various foreseeable conditions. In the rulemaking that promulgated the regulations, the Commission stated:

> The efficiency standards required for new oil or natural gas cogeneration facilities are intended to assure efficient use of these premium fuels. Use of optimum or design basis circumstances for determining efficiency would not satisfy the Commission's concern. A computation based upon projected or estimated annual operations will more closely reflect the facility's actual energy conservation potential.[145]

Although degradation of generating facilities is anticipated and generally described by manufacturers, and is taken into account over the life of the project in maintenance schedules, overhauls, etc., factors such as labor strikes and reduction in market demand of certain products are unpredictable and presumably will be taken into account by adjustments in annual operations, if and when they occur. To accept the intervenors' argument would mean that the Commission could never certify a cogeneration facility since we never know, with absolute certainty, how much steam will actually be taken. We believe it reasonable to rely on the contract commitments with Dow.

Third, the Municipals assert that while the Applicant assumes an efficiency of 33.6% (10,158 Btu/kWh) for

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[145] Small Power Production and Cogeneration Facilities Qualifying Status, Final Rule, *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,134, at p. 30,949 (1980).

the type of gas turbine used, based on the manufacturer's information, the efficiency is 32.3% (10,560 Btu/kWh) at industry standard operating conditions. Therefore, they assert it is unlikely that the facility will meet the efficiency standard if the Unit 2 steam turbine generator (the backup) operates at a 100% capacity factor. This argument is without merit. As modified to reflect atmospheric conditions and the elevation at Midland, Michigan, the application is consistent with the manufacturer's data.

Fourth, the Municipals assert that no explanation is provided in the application for the difference between the quantity of fuel used under 100% utilization of the Unit 1 steam pressure turbine (71.9×10^{12} Btu/year) and 100% utilization of Unit 2 (71.7×10^{12} Btu/year) and that using correct fuel consumption, it is unlikely that the facility will meet the efficiency standard. We see no need for the Applicant to explain the obvious. Unit 2 is less efficient than Unit 1 and therefore the facility will produce less total power output when Unit 2 is operating. Accordingly, total fuel input to the facility will also decrease when Unit 2 is operating. Even assuming the same fuel input, the facility meets the efficiency standard.

Fifth, the Michigan Municipals assert that while the application states that Dow will consume the entire steam energy provided to it by the facility, it is not clear what Dow will do with the steam. Arguing that the steam must be useful thermal output, and citing to 18 C.F.R. § 292.202(c), *LaJet Energy Company*, 43 FERC ¶ 61,288 (1988), and *Electrodyne, supra*, the Municipals argue that no such showing has been made. They further assert that thermal losses have not been considered.

As reflected in the application, Dow will use the steam in its chemical manufacturing process and for spacing heating. These are common industrial applications that are presumptively useful. *See Electrodyne*, 32 FERC at p. 61,279. Moreover, the thermal losses are insignificant.

Sixth, the Municipals assert that the Applicant has failed to show the impact of operating at a 75% capacity factor in its calculations of efficiency, i.e., it is not clear whether only 9 of the 12 combustion turbine generators will operate at full load at any time, whether all 12 units will operate at 75% load all the time, or whether MCV intends to operate all 12 units at full load during peak periods and shut down some of the units during off-peak periods. If any of the above scenarios transpires, Municipals assert it is unlikely that the facility will meet the efficiency standard since the Applicant has failed to include in the calculations additional fuel necessary for cold starting the units or inefficiencies associated with operating the units at less than full load.

We find MCV's computations to be accurate. The varying load requirements are to be met by operating a minimum number of combustion turbines at or near full rate output. Although a number of startups may be necessary, the additional fuel required for such purposes is insignificant and if considered will not cause the facility to fail to meet the efficiency standard.

Finally, the Municipals and the State challenge the Applicant's efficiency calculations on the basis that Dow's 6.2 MW back-pressure turbine is included. This same argument was considered and rejected in the discussion above under operating standard. For the same reason it is rejected here.

In conclusion, we find that the MCV facility will satisfy the operating and efficiency standards. Our calculations are set forth in the Attachment to this order.

V. Old vs. New Capacity

The Michigan Municipals also argue that even if the MCV project is deemed independent from Consumers Power, having received Midland assets which were almost certainly constructed before November 9, 1978 it does

not meet the standards for new capacity contained in section 292.304(b)(1).[146] Pointing out that construction of the Midland plant as a nuclear cogeneration project was commenced prior to November 9, 1978, the Municipals state that a portion of the MCV project consists of assets the construction of which commenced prior to that date as part of the nuclear project. If MCV is not recognized as merely a Consumers Power plant, the Municipals state, it is necessary to determine, as part of the recertification application, what portion of the capacity of the MCV project, if any, constitutes "new capacity." Citing a request of Consumers Power for an IRS ruling regarding when certain tax benefits accrue, they state that Consumers Power admitted that construction of the MCV cogeneration project was commenced at the time the construction of the nuclear cogeneration project was commenced, i.e., prior to November 9, 1978.

Even if the Municipals' characterization of MCV as a project which included some "old capacity" were correct, MCV counters that the issue is irrelevant to this application for recertification, as the "new" vs. "old" determination matters only insofar as different rates may obtain under section 292.304 of the regulations. MCV adds that a facility can represent "new capacity," "old capacity," or a mix and still be a qualifying facility if it satisfies the ownership and technical requirements. MCV says for that reason, the Commission has certified many projects comprised of "old" and "new" capacity with no more than a simple reference to section 292.304.[147] MCV further avers that, in any case, the assets in question cannot be classified as "old" capacity. While it is true that some previously constructed portions of the Midland nuclear plant are contained within the MCV facility, MCV

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[146] 18 C.F.R. § 292.304(b)(1) (1989).

[147] MCV Answer to Michigan Municipals Protest at 16, *citing Exxon Chemical Company and Exxon Company, U.S.A.*, 47 FERC ¶ 62,047 (1989); *P.H. Glatfelter Co.*, 34 FERC ¶ 62,204 (1986).

asserts that those assets were incapable of generating any electricity and that it is only through construction of the MCV facility (which commenced in 1987), that capacity will be available to Consumers Power and its customers.

The MCV capacity is properly viewed as new capacity under section 292.304(b)(1) of our regulations. We have held that it is possible for a facility that was fully constructed prior to November 9, 1978 to qualify in whole or in part as new capacity if it has been subject to significant rebuilding after that date. *See International Paper (Natchez Mill)*, 33 FERC ¶ 61,339 and *E.I. Du-Pont de Nemours, Inc.*, 33 FERC ¶ 61,340 (1985); *Union Camp Corporation*, 34 FERC ¶ 61,390 (1986). However, this assumes that the equipment in question was previously employed in the production of power. That is not the case here. The facilities in place prior to the proposed conversion to a gas-fired cogeneration facility never produced electricity. Rather, conversion and ultimate completion of the facilities to create a plant capable of producing electricity was subsequent to November 9, 1978. We believe this properly qualifies the facility as a whole as new capacity; without the conversion no qualifying facility would have existed.

VI. The Request for Waiver

Reiterating in summary form the arguments made in its brief, Michigan alleges that the original certification's requirements were not met on June 2, 1989, and are not being met today. As a result, the State finds the request for waiver inappropriate. Further, referring to MCV's representation that it will in fact comply with the operating and efficiency standards for the 12-month period beginning on the initial operation date, it says that statement is subject to question in light of the facility's inability to meet prior representations made in the original application for certification. Additionally, it says that the fact that the facility has engaged in self-dealing with

the utility requires, at the very least, careful scrutiny of these representations, as does the fact that the current application indicates the efficiency standard is barely above the required 45%.

In response to MCV's argument that the Commission should use its general equitable powers, Michigan alleges that, contrary to MCV's representations, the facility will not bring about the economically productive utilization of existing assets which Consumers Power now values at approximately $1.5 billion; for as argued above (*see* section III. B.1.a *supra*) not all the transferred assets can in fact be economically utilized. Additionally, the State says it appears that the Midland project has a construction cost of approximately $1,883 per kW, which is much higher than the proxy coal-fired facility utilized by the Michigan Commission (for determining avoided costs) with construction costs of approximately $1,448 per kW, and a lot higher than the cost of a new combined-cycle facility at roughly $600 per kW.

Michigan also argues that MCV's allegations that the project will provide employment is irrelevant. In the first place, it says Consumers Power has failed to assert that the Midland area, home of the Dow Chemical Company, is a depressed area, as was alleged in *Nelson*. Second, pointing out that there was approximately 3,000 megawatts of cogeneration facility capacity competing for contracts in Consumers Power's territory in Case No. U-8871 before the Michigan Commission, and many did not get contracts, the State alleges that Consumers Power and MCV have in fact frustrated the creation of many jobs in different Michigan localities. In that regard, the State points out the following Michigan Commission statement:

> Consumers [Power's] decision to contract with its own project for the bulk of the capacity it will purchase and to challenge the Michigan Commission's authority to require a diverse mix of qualifying facilities will leave the State without a reasonable co-

> generation policy for Consumers [Power's] service territory, will not allow the development of many small qualifying facilities, and will create a situation of legal ambiguity that may not be resolved for many years. As a consequence of Consumers Power's actions, all, or almost all, of the capacity needed through 1997 will be provided by a project in which Consumers [Power] has a substantial ownership interest; all, or almost all, of the capacity will be fueled by natural gas; most of the capacity will be provided by a single, large generating facility; and a variety of small projects using diverse fuels will have little chance to develop in the next five to ten years in Consumers [Power's] territory.[148]

Michigan also alleges that denying MCV the temporary waiver and the recertification it has requested will not frustrate PURPA's goal of encouraging cogeneration. Rather, the incentive for developing MCV is Consumers Power's ability to recover and earn a return on $1.5 billion (in 1986 book value) of the abandoned Midland nuclear plant assets, according to the State.

Like the State, the Municipals argue that the conversion of the Midland facility was not induced by PURPA. Adding that certification here relates solely to the nature of the ownership, the size of the profits to Consumers Power, and the ability of questionable assets, they state that the plant was, and continues to be, economically viable as a Consumers Power plant or as an IPP.

In response to MCV's argument that the Midland will give productive economic life to previously unused assets valued at approximately $1.5 billion, the Municipals reiterate their contentions that the assets have little, if any, real value to a gas-fired generation plant. Adding that

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[148] State of Michigan Answer to MCV Petition at 6, *quoting Midland Cogeneration Venture, L.P. et al.*, U-8871 *et al.*, Opinion and Order, September 26, 1989 at 5-6.

this use is a direct result of the control of MCV by Consumers Power, which has resulted in a capital cost of *$1600 kW compared with a normal cost* of $600 kW for a gas-fired cogeneration plant, they argue that rather than giving useful life to those assets, the MCV partnership is merely paying Consumers Power $1.2 billion for the generous contracts arranged through the self-dealing and deception described above.

The Municipals also dispute MCV's employment and economic growth argument. Stating that unlike the facility in the *Nelson* proceeding, this project does not hinge on certification as a qualifying facility, they argue that the real issue is whether it satisfies the Commission's regulations for certification. In fact, they contend that dismantling the useless Midland shell also would have created jobs, as would operating MCV as an IPP or as a Consumers Power plant.

With respect to MCV's argument that waiver should be granted because the facility incorporates unique design features which enhance efficiency, the Municipals state that those features are unspecified and says even if every one of the questions surrounding the MCV calculations of efficiency were resolved in MCV's favor, MCV is only marginally within the efficiency guidelines. The reason for being so close to the margin is clear, they claim: Consumers Power has deliberately oversized the electric output of the facility for a given steam load so as to build a "PURPA machine" and maximize profits/ pass-through to the ratepayers of the $1.2 billion in questionable assets.

The Municipals argue further that the status of the plant as a qualifying facility when operating will, if anything, increase the amount of energy consumed and decrease the efficiency of the plant. As noted above, they argue that in order to maximize profits, Consumers Power has deliberately built a "PURPA machine" and has maximized the electric output from the MCV for a g..en

steam load. In contrast, they state, if this were a regulated rate base plant, Consumers Power would be under a much greater incentive to maximize the efficiency and cost-effectiveness of the plant. They state that MCV would achieve maximum efficiency at an electric output in the 600 MW range. Thus, they conclude, granting qualifying facility status actually will work to *decrease* overall efficiencies, rather than increase them.

The Municipals also contrast the Commission's granting of a waiver in the *City of New Martinsville, West Virginia* proceeding [149] with MCV's request. Pointing out that in *New Martinsville* the city was permitted to own a qualifying facility because that status and the use of avoided cost pricing were necessary to the economic viability of the project, they argue that unlike the instant case, that situation involved a finding that "there is salient information on the part of the city." *Id.* at p. 61,737. Having constructed the facility differently from its initial certification, they state that MCV cannot now come before the Commisison and seek to have only those issues heard which it seeks to have heard. Further, based on their allegation that the conditions in the original order were breached and the order by its own terms never became effective, they assert that MCV must demonstrate that it meets all requirements of the statute and the regulations.

We will grant the waiver. The Midland facility presents a unique set of circumstances which convinces us that a strict application of our operating and efficiency standards for calendar year 1989 would be inappropriate. Each of these factors, in isolation, is not dispositive. However, their cumulative effect leads us to conclude that waiver of the standards for calendar year 1989 is appropriate and consistent with our statutory responsibilities. Accordingly, we will grant MCV's request for waiver

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[149] 35 FERC ¶ 61,322 (1986).

pursuant to our general authority to waive Commission regulations where doing so would be in the public interest,[150] based on the following specific facts.

First, while the technology for this facility is not innovative, the difficulties in operating 12 combustion turbines in a cogeneration facility are real. To our knowledge, no other facility with similar operating characteristics is currently in operation. Accordingly, it seems reasonable that the testing phase of this facility would be longer than that required for facilities using more standard operating formats. Significantly, the period of the waiver is limited and the Applicant has assured us that additional waivers will not be necessary.

Second, we cannot ignore the fact that this facility will make productive use of assets intended to be used in a cancelled nuclear unit. Whether the value is between $1.2-$1.5 billion as determined by the non-Consumers Power Partners, or some lesser value, there can be no argument with the fact that the value of these assets is significant. We simply do not see how the waste of these assets can be in the interest of this Nation. Of course, we have no assurance that denying waiver would necessarily lead to unproductive use of these assets—this project *could* still go forward.[151] However, we are unwilling to take this risk given our responsibilities to ensure the Nation a reliable supply of power.

Third, it appears that this project has had some positive effect on employment in Michigan during the construction and testing phase and will continue to have a modest positive effect during its operation phase.

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[150] 16 U.S.C. § 825h (1988).

[151] As noted above, if waiver is denied, MCV will be a public utility under the Federal Power Act for the period June 2-December 31, 1989. However, based on our findings herein, the facility would be a qualifying facility as of January 1, 1990.

Fourth, the facility is designed to burn natural gas, an environmentally clean fuel.

Finally, Congress charged us with encouraging qualifying facilities. We cannot ignore the fact that this facility is the largest cogeneration facility ever to seek certification from the Commission in the ten years since our PURPA regulations have been effective. An unfavorable decision here could realistically affect the capital markets' perception of the risk of this industry. If so, capital costs for alternate energy projects would rise to compensate for the additional risk. This, in turn, could result in efficient qualifying facility projects not being built.

This waiver request, as with *every* other waiver request we have faced under our PURPA regulations, is difficult. Nevertheless, we believe in these circumstances waiver is appropriate.

The Commission orders:

(A) The Michigan Municipals' timely, opposed motion to intervene is hereby granted.

(B) The motions to consolidate Docket Nos. QF87-237-001 and QF87-237-002 are hereby denied.

(C) The State's petition for revocation of qualifying status in Docket No. QF87-237-000 is hereby dismissed as moot.

(D) MCV's petition for waiver of the operating and efficiency standards for calendar year 1989 is hereby granted.

(E) The application for recertification of qualifying status filed on November 2, 1989 and completed on December 1, 1989, by Midland Cogeneration Venture, L.P., pursuant to section 292.207 of the Commission's regulations and section 3(18)(B) of the Federal Power Act, as amended by section 201 of the Public Utility Regulation Policies Act of 1978, is hereby granted, pro-

vided that the facility operates in the manner described in the application.[152]

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[152] Certification as a qualifying facility serves only to establish eligibility for benefits provided by the Public Utility Regulatory Policies Act of 1978, as implemented by the Commission's regulations. 18 C.F.R. Part 292 (1989). It does not relieve a facility of any other requirements of local, state or federal law, including those regarding sitting, construction, operation, licensing and pollution abatement. Certification does not establish any property right, resolve competing claims for a site, or authorize construction.

APPENDIX A

Chronology of Ownership-Related Events

Date—Event

January 24, 1987—Application for certification by CMS Midland Inc. in Docket No. QF87-237-000

January 27, 1987—Execution of MCV Original Limited Partnership Agreement

- CMS Midland was the general partner
- Tempco I, Tempco II (Consumers Power (subsidiaries) and Rofan (a Dow Chemical subsidiary) were limited partners
- Consumers through its subsidiaries held more than 50% of the partnership equity

Execution of Original MDC Transfer Agreement

- Transfer of the Net Project was to take place at the 1986 book value (approximately $1.5 billion) plus interest

March 12, 1987—FERC order granting certification

- The order was premised on CMS Midland's representation that, as of the initial operation date, CMS Midland would have no more than a 50% equity interest (stream of benefits and control) in the partnership.

June 9, 1988—Execution of the Amended and Restated MDC Transfer Agreement

- Executed by MCV and MDC
- The transfer price for Net Project assets was subjected to limitations based on specified debt coverage and requirements of the MCV New Partners for a target rate of return

- Provision was made for the non-CMS Partners (except Rofan) to negotiate the terms of notes that will constitute consideration for the transfer.

June 13, 1988—Execution of the Amended and Restated Partnership Agreement

- Tempco I and Tempco II withdrew
- The New Partners were admitted
- CMS Midland's voting power was reduced to 49%

May 26, 1989—Execution of Amendment No. 1 to the Amended and Restated Partnership Agreement

- CMS Midland's allocations of profits, losses, surplus and tax benefits were reduced so as not to exceed 50%

June 2, 1989—Power was first delivered to the Consumers Power grid—for testing purposes.

September 27, 1989—Execution of the Memorandum of Agreement With Respect to the Amended and Restated MDC Transfer Agreement

- The Memorandum defines the terms of the MDC Notes to be issued in consideration of MDC's transfer to the Net Project assets pursuant to the Amended and Restated MDC Transfer Agreement
- The negotiation and execution of the Memorandum were undertaken pursuant to provisions of the transfer agreement tying the asset price to the required debt coverage ratio and the New Partners' target rate of return, and subject to a cap (the Original Transfer Price).

Execution of the Memorandum of Agreement With Respect to the Amended and Restated Partnership Agreement

- The Memorandum sets forth the parties' agreement to proceed with implementing the Drexel Pro-

posal (for refinancing) presented by CMS Midland pursuant to a requirement of the Amended and Restated Limited Partnership Agreement

November 2, 1988—Application for Recertification

January —, 1990—Transfer of Net Project assets pursuant to the Amended and Restated MDC Transfer Agreement

- Execution of MDC Notes (as consideration) utilizing forms incorporating the terms set forth in the September 27, 1989, Memorandum of Agreement.

ATTACHMENT

Docket No. QF87-237-001

Operating and Efficiency Calculations

Useful Thermal Output

(260,000 lb/hr × (1,122.2 — 28.1) Btu/lb + 260,000 lb/hr × (1,204.2 — 28.1) Btu/lb) × 8,760 = 5.2 × 10^{12} Btu/yr

Useful Power Outputs:

Unit 1

1,393,700 kW × 8,760 hr/yr × 3,413 Btu/kWh × .75 [1] × .9 [2] = 28.1 × 10^{12} Btu/yr

Unit 2

1,332,000 kW × 8,760 hr/yr × 3,413 Btu/kWh × .75 = 3 × 10^{12} Btu/yr

(Dow)

6,200 kW × 8,760 hr/yr × 3,413 Btu/kWh = .2

Total Useful Power Output = (28.1 + 3 + .2) × 10^{12} = 31.3

Energy Inputs:

Unit 1

71.9 × 10^{12} Btu/yr × .9 = 64.71 × 10^{12} Btu/yr

Unit 2

71.7 × 10^{12} Btu/yr × .1 = 7.17 × 10^{12} Btu/yr

Total Energy Input = 64.71 + 7.17 = 71.9 × 10^{12} Btu/yr

$$OS = \frac{5.2}{5.2 + 31.3} = 14.2\%$$

$$ES = \frac{31.3 + .5 \times 5.2}{71.9} = 47.1\%$$

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[1] Capacity Factor.

[2] Unit 1 will operate 90% of the time.

[3] Unit 2 will operate 10% of the time.

APPENDIX E

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. QF87-237-002 and QF87-237-001

MIDLAND COGENERATION VENTURE, L.P.

Docket No. QF87-237-000

CMS MIDLAND INC.

ORDER GRANTING APPLICATION FOR RECERTIFICATION AS A QUALIFYING COGENERATION FACILITY

(Issued March 1, 1990)

Before Commissioners: Martin L. Allday, Chairman; Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.

On November 14, 1989, Midland Cogeneration Venture, L.P. (MCV or Applicant) submitted for filing an application for recertification, as a qualifying cogeneration facility, of a topping cycle facility located in Midland, Michigan. The facility was previously recertified on January 31, 1990. *CMS Midland, Inc. et al.*, 50 FERC ¶ 61,098 (1990). The instant application is presented to reflect a change in ownership that would take place pursuant to a proposed sale leaseback of the facility to effect its permanent financing.

Notice of the application was published in the *Federal Register*, with comments, protests, or motions to intervene due on or before January 3, 1990.[1] On that date, the Michigan Public Service Commission (Michigan Commission) filed a notice of intervention and two others moved to intervene: the Michigan Attorney General, on behalf of the State of Michigan (Michigan or the State), filed two pleadings collectively moving to intervene and protest and seeking hearings and consolidated consideration of the matters presented in this docket and Docket Nos. QF87-237-000 and QF87-237-001;[2] and the Michigan Municipal/Cooperative Group (Michigan Municipals)[3] filed a motion to intervene, request for hearing and motion to consolidate. On January 17, 1990, MCV filed individual answers responding to the State and the Michigan Municipal/Cooperative Group (Michigan Municipals)[3] filed a motion to intervene, request for hearing and motion to consolidate. On January 17, 1990, MCV filed

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[1] 54 Fed. Reg. 50,014 (1989).

[2] The two pleadings are: (1) a motion for intervention, motion for consolidation, request for an evidentiary hearing and protest in opposition to the Midland Cogeneration Venture's second recertification application; and (2) a brief in support of the motions, protest and request for hearing.

[3] For purposes of the initially filed intervention, the Municipals state that they consist of virtually all of the publicly owned municipal and cooperative electric systems in Michigan's lower Peninsula. Specifically, intervention is requested by the Michigan Ratepayers Group, which includes the City of Bay City, the City of Charlevoix, the Village of Chelsea, the City of Eaton Rapids, the City of Harbor Springs, the City of Hart, the City of Lowell, the City of Petoskey, the City of Portland, the City of Saint Louis, and the Wolverine Power Supply Cooperative, Inc.; the Michigan South Central Power Agency (MSCPA) on behalf of itself and its members; the Michigan Public Power Agency (MPPA) on behalf of itself and its members; the Michigan Municipal Electric Association (MMEA) on behalf of itself and its members; the Wolverine Power Supply Cooperative, Inc.; and in addition, the Lansing Board of Water & Light, and Cities of Saint Louis, Charlevoix, Holland, Portland, Traverse City and the Wolverine Power Supply Cooperative, Inc.

individual answers responding to the State and the Michigan Municipals' January 3, 1990 pleadings. Subsequently, on January 26, 1990, the Michigan Municipals filed a motion to clarify identification of parties in this docket and Docket Nos. QF87-237-000 and QF87-237-001.[4]

Background

The Recently Recertified Facility

In the Commission's January 31, 1990 order, the Commission found that, as of June 2, 1989, when the Midland facility first produced electric power and delivered it to the transmission grid of Consumers Power Company (Consumers Power) for testing purposes, the MCV partnership satisfied the utility ownership criteria of section 292.206 of the Commission's regulations.[5] *CMS Midland, Inc.*, 50 FERC ¶ 61,098, at pp. 61,278-279. The Commission also found that while the facility could not satisfy the operating and efficiency standard requirements of section 292.205 of the regulations[6] for calendar year 1989, when the facility was undergoing testing, it would

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[4] The Municipals seek by this motion formal individual interventions by the following cities which had sought intervention as members of power supply agencies or MMEA as part of the Municipals Group: the Cities of Bay City, Charlevoix, Eaton Rapids, Harbor Springs, Hart, Lowell, Petoskey, Portland, Saint Louis and Zeeland; the Village of Chelsea, the Grant Haven Board of Power & Light, the Holland Board of Public Works, the Lansing Board of Water & Light and Traverse City Light and Power. Also sought is the separate intervention of the Southeastern Michigan Rural Electric Cooperative, Inc., which is not participating as part of the Municipal Group. The Municipals explain that the individual interventions are late as a result of the time which it takes for formal approval by certain city governing bodies and, since each is a member of a power supply agency or group which has already sought timely intervention, a grant of their motion is appropriate and will clarify the identity of those seeking a direct interest and desiring direct participation in these cases.

[5] *See* 18 C.F.R. § 292.206(b) (1989).

[6] *See* 18 C.F.R. § 292.205 (1989).

meet those criteria in calendar year 1990, when the facility would be fully operational. *Id.* at pp. 61,279, 61,299, 61,303. With regard to calendar year 1989, the Commission found sufficient reasons existed to grant a requested waiver of the operating and efficiency standards for calendar year 1989. *Id.* at pp. 61,279, 61,305.

The facility, as certified on January 31, 1990, consists of twelve combustion-turbine generators, twelve heat recovery steam generators and two extraction/condensing turbine generators. One of the turbine generators (Unit 2) is primarily intended to serve as a backup when the primary steam turbine (Unit 1) is not available for service. Total net electric power production capacity of the facility is 1393.7 MW.

The Commission found the structure of the MVC partnership and related financial transactions demonstrated that electric utility equity interests in the MCV partnership did not exceed 50 percent. The Commission found specifically that the agreements governing the MCV partnership [7] insured that CMS Midland, Inc., the Consumers Power subsidiary which is a general partner in MCV, does not have a greater than 50 percent interest in the partnership's stream of benefits and is also limited in its voting power to 49 percent. *Id.* at pp. 61.279-282. Additionally, the partnership issued notes to MEC Development Corporation (MDC), another wholly owned Consumers Power subsidiary, as consideration for the transfer to MCV of certain assets referred to as the Net Project. Pursuant to the terms of the agreements establishing the terms of the MDC transfer of the Net Project, the amount of the MDC Notes could fluctuate between $1.2 billion and $1.5 billion, depending on certain events,

[7] The agreements are: (1) the Original Partnership Agreement, dated January 27, 1987; (2) the Amended and Restated Partnership Agreement, dated June 13, 1988; (3) Amendment No. 1 to the Amended and Restated Partnership Agreement, dated May 26, 1989; and (4) the Memorandum of Agreement With Respect to the Amended and Restated Partnership Agreement, dated September 27, 1989. *See* 50 FERC at pp. 61,306-307.

most significantly approval by the Michigan Commission of a capacity price payable to MCV above the currently approved 3.77¢ per kWh.[8] The Commission held that these notes constituted debt (rather than equity) and, accordingly, that these financial transactions did not result in electric utility equity interests exceeding 50 percent.[9]

The Second Recertification Proposal

MCV proposes, as a permanent facility financing vehicle, a leveraged lease transaction which will involve an affiliate of Consumers Power and other electric utility affiliates as Owner Participants. The Owner Participants will purchase the facility and lease it back to MCV. MCV asserts that the Owner Participant interests to be acquired by the Consumers Power affiliate and any other electric utilities or electric utility holding companies or any affiliate or combination thereof (hereinafter "electric utility entities") will never equal or exceed 50 percent of these interests. MCV asserts that this sale leaseback can provide permanent financing at a lower overall cost than conventional debt financing. MCV seeks Commission certification that these arrangements will not cause the facility to lose its qualifying facility (QF) status.

MCV has presented the proposed leveraged lease structure and a "final draft" of a term sheet summarizing the terms and conditions of the leveraged lease transaction in attachments to the application (Attachment No. 1 and Attachment No. 2, respectively). Though the details presented in the attachments may change somewhat in the process of completing the final negotiations, MCV states that the transaction will generally work as follows. Legal title to undivided interests in the facility will be conveyed to grantor trusts (the "Owner Trusts") established for the

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[8] *Id.* at pp. 61,270-271.

[9] *Id.* at pp. 61,285-286.

benefit of the Owner Participants. Each Owner Trust will acquire an undivided beneficial interest in the facility proportionate to its Owner Participant's investment. The facility will then be leased back to MCV under identical "triple net" leases.[10]

The Owner Participants will raise a portion[11] of the price paid to acquire their undivided interests by borrowing on a nonrecourse basis through their Owner Trusts. According to MCV, this debt will be placed in one of two ways: (1) private placement; or (2) pledging the nonrecourse notes issued by the Owner Trusts to a second entity ("Funding Corporation") which in turn will issue bonds for public distribution.[12] The Notes will be issued by the Owner Trusts to evidence the assumption or refinancing of debt on which MCV itself would have remained obligated had it retained title to the facility.[13] Security for the Owner Trust Notes will be provided by liens on the facility and collateral assignments of the

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[10] According to MCV, this means that essentially all costs and risks associated with the ownership and operation of the facility during the lease term will be assumed by MCV as lessee. MCV Application at 4.

[11] Approximately 70 percent. *Id.*

[12] The purchase price for the facility is based, in part, upon a revenue stream that assumes that MCV will charge Consumers Power an average capacity rate for MCV power of 3.77¢ per kWh. The Owner Participants have agreed to increase the purchase price for the facility if it is finally determined that Consumers Power can recover capacity payments to MCV from its retail customers that average in excess of 3.77¢ per kWh. An adjustment of the consideration for the purchase of the MCV facility will also require an increase in MCV's lease payments. MCV Application at 5, *citing* Attachment No. 2, § 1.12 at pp. 10-11.

[13] A portion of the Notes issued by the Owner Trusts will be issued to MDC in consideration for the Net Project assets. According to MCV, MDC has indicated its intention to sell these notes as soon as market conditions permit. MCV Application at 5, n. 5.

leases, including all rent payable under those leases and all security for the leases.[14]

Rent derived from the leases is divided into three categories. The first is termed "Basic Rent," which is an amount sufficient to pay the debt service on the Owner Trust Notes and to provide the Owner Participants with a negotiated basic investment return (Net Economic Return). The second category is "Special Supplemental Rent," an amount equal to 15 percent of Excess Net Cash [15] which is payable in any year only to the extent that MCV realizes any such Excess Net Cash from the operation of the facility. Special Supplemental Rent is capped at $300 million over the (25-year) basic lease term. The third category, "Supplemental Rent," includes Stipulated Loss Value and Termination Value [16] and all other amounts payable by MCV under the various transaction documents including, for example, interest on overdue rent or indemnity payments. To minimize the possibility of default, the Owner Participants have reserved the right to defer that portion of Basic Rent payable to them, but if Basic Rent is ever deferred, MCV must pay interest on the amount deferred during the deferral period.

For tax purposes there are a number of requirements to be met in order for the Owner Participants to be considered the owners of the facility. First, the term of the leases is limited to no more than 80 percent of the esti-

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[14] An example of such security would be a pledge of MCV's rights under the power purchase, steam sales or other facility agreements. *Id.*

[15] This is the amount by which net cash realized by MCV in a year exceeds net cash available for distribution to the MCV partners set forth in preliminary economic projections utilized in these transactions. MCV Application, Attachment 2, § 1.17 at p.15.

[16] Amounts payable to the Owners Participants as a recovery of their investment in the event of an early termination of the leases. MCV Application at 6.

mated useful life of the facility. Second, MCV cannot acquire the facility back from the Owner Participants for "nominal" consideration. MCV states that these requirements are satisfied by provisions limiting the basic lease term to 25 years [17] and limiting MCV's rights (a) to renew the lease term either for its fair market rental value for up to 20 additional years (i.e., 45 years overall) or for a fixed rate renewal (at between 50-65 percent of the Basic Rent) for 80 percent of its useful life as redetermined at the end of the basic lease term and (b) to purchase the facility at the end of the basic lease term or any renewal term at its then fair market value or at the end of the basic lease term at a fixed price equal to a certain percentage of the Owner Participants' cost of the project.

Under the leases, MCV is to have complete possession and control over the facility, subject to standard maintenance, insurance and financial covenants similar to those normally found in traditional project financings. More specifically, MCV states that it will be fully responsible for performance of its obligations under its power sales agreements with Consumers Power and Dow Chemical Company, for selling additional power produced by the facility, for contracting for gas and other supplies, for all labor matters, for environmental complaince and for every other aspect of managing and operating the facility. Further, pursuant to a covenant of quiet enjoyment, the Owner Participants are to do nothing to interfere with MCV's use, enjoyment and possession of the facility as long as there is no default under the leases.[18]

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[17] This is based upon a 45-year estimated useful life for the facility. *Id.*

[18] The MCV Partnership Agreement will be amended to add a new corporate general partner (MCV Corp.) having a general partnership interest of .001 percent absent default, but in the event of default to have its voting interest increase to 99 percent. MCV Corp.'s voting interest will likewise increase to 99 percent should Consumers Power exercise its rights under the purchase power agreement to defer payments thereunder if MCV does not

The Owner Participants (or the trustees under the Owner Trusts acting on their behalf) will have rights under the leases comparable to those of secured lenders, such as covenant enforcement, periodic facility inspection, receipt of notice of adverse events, declaration of defaults and exercise of remedies. However, these rights will be assigned as part of the security for the Owner Trust Notes, and the rights the Owner Participants would otherwise have to declare defaults under the leases and to dispossess MCV will be assigned to the identure trustees acting on behalf of the holders of the notes.

MCV presents two arguments in support of its contention that the proposed sale/leaseback will not jeopardize the facility's QF status: (1) the Owner Participants are more properly viewed as creditors rather than equity holders for purposes of applying the Commission's limitations on electric utility equity ownership of QFs, since the amount of debt held by electric utilities is not restricted in any way by the Public Utility Regulatory Policies Act (PURPA)[19] or the Commission's implementing regulations; and (2) should the Commission conclude that an Owner Participant's interest is more like equity than debt, the electric utility-affiliated interest of the Owner Participants is less than 50 percent, meaning the facility remains fully in compliance with the Commission's restriction on electric utility ownership.

First, MCV notes that the Commission has recognized in a variety of contexts that sale-leaseback transactions are merely financing mechanisms.[20] MCV quotes the fol-

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have adequate gas supplies, but only with regard to gas supply related matters. The stock of MCV Corp. will be pledged to the Owner Participants. MCV Application at 8, *citing* Attachment 2, § 1.4 at p. 1.

[19] 16 U.S.C. § 2601 *et seq.* (1988).

[20] MCV Application at 11, *citing Baltimore Refuse Energy Systems Company* (BRESCO)/*Wheelabrator Millbury, Inc.* (Wheelabrator), 40 FERC ¶ 61,366 (1987).

lowing language from *Pacific Power & Light Co. (PP&L)*[21] in which the Commission concluded that equitable title under a leveraged lease was not the type of ownership contemplated under section 201(e) of the Federal Power Act (FPA)[22]:

> . . . It would be inconsistent with the intent of the [Federal Power] Act to label the Parties as public utilities and include them within our jurisdiction just because the Parties hold mere equitable or legal title to the subject electric facilities and where they are clearly removed from the actual operation of the facilities and the sale of power. The leverage lease arrangement is essentially a financing device which serves to reduce Applicant's cost of service, and the Parties participation does not make them public utilities.

MCV Application at 12, *quoting* 3 FERC at p. 61,337.

MCV next notes that the Commission has applied this rationale in the QF context. MCV cites *Allegheny Electric Cooperative, Inc. (Allegheny)*,[23] in which Allegheny sought QF certification for a hydroelectric project that it had sold to a trustee holding legal title for the benefit of Ford Motor Company. Under the lease to Allegheny from the trustee, Allegheny remained in total control of the operation and maintenance of the project and able to "produce and sell power under its own power supply

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[21] 3 FERC ¶ 61,119 (1978). Pacific Power & Light Company and Black Hills Power & Light Company proposed to enter into a "leveraged lease" where the subject project would be sold to a Trust for the beneficial ownership of four financial institutions (Owner Participants). The trustee, a bank, was to hold legal title and lease the facility back to Pacific Power & Light and Black Hills.

[22] 16 U.S.C. § 824(e) (1988).

[23] 47 FERC ¶ 61,015 (1989).

contracts in the same manner as it did prior to the sale-leaseback." [24]

MCV then argues that the Commission found that application of the rationale utilized in *PP&L* and other cited cases was "appropriate in determining whether a facility is 'owned' by an entity primarily engaged in the generation or sale of electric power from non-qualifying facilities where such an entity has dominion and control of the proposed qualifying facility pursuant to a sale-leaseback transaction." [25] MCV quotes the following finding by the Commission:

> Although the Owner Participant and the Owner Trustee have legal or equitable title to the facility, they have no voice in or dominion over the maintenance and operation of the facility. Instead, Allegheny will continue to have complete control over its maintenance and operation. During the term of the lease, Allegheny will continue to receive capacity and energy credits for power produced at the facility under its contract with Penelec, as well as have the benefits of several wholesale power supply contracts with other utilities. Thus, the instant sale leaseback transaction is merely a financing mechanism from which the Owner Participant derives certain tax and investment benefits while Allegheny benefits from lower financing costs.

MCV Application at 13-14, *quoting* 47 FERC at p. 61,054. MCV adds that had the Commission concluded otherwise, it would have permitted the electric cooperative as lessee to "effectively avoid the utility ownership restriction while continuing to control the facility merely by restructuring its financial arrangements. . . ." *Id.* at p. 61,055.

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[24] MCV Application at 13, *quoting* 47 FERC at p. 61,055.

[25] *Id. quoting* 47 FERC at p. 61,054.

MCV argues that this reasoning is equally compelling in the instant case as the sale/leaseback is directly analogous to the situation addressed by the Commission in *Allegheny*. MCV states: (1) the Owner Participants will have no voice in or control over the facility and its activity (other than through covenants typically required by lenders in project financings);[26] (2) MCV as lessee will remain in possession and control of the facility and be responsible for all aspects of the operation and maintenance of the MCV facility;[27] (3) MCV will have the right to make any modifications, alterations, additions or improvements to the facility, provided such modifications do not decrease the value, utility, or useful life of the facility;[28] (4) MCV as lessee will also be in total control of the sale of power and steam from the facility, including the sale of any excess power not contracted for and all aspects of satisfying its obligations under the executed power sales contracts; and (5) MCV will be responsible for paying all costs, rents, license and technical service fees, taxes, charges, and fees associated with the use, possession, control and operation of the MCV facility.[29]

Despite the fact that a Consumers Power affiliate and other electric utility entities may become Owner Participants, MCV argues that the *Allegheny* rationale is dispositive because the "stream of benefits" test permits electric utilities to make disparate capital contributions, loans, and other forms of debt provided that the utilities' share of the venture's profits remain within the 50 percent

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[26] *See for example*, Attachment No. 2, § 1.33 at pp. 30-31. MCV adds that while the Commission's order in *Allegheny* did not disclose the nature of the financial covenants applicable to the transaction, all leveraged lease transactions contain very similar covenants. MCV Application at 14, n. 16.

[27] MCV Application at 14, *citing* Attachment No. 2, § 1.24 at pp. 19-20.

[28] *Id. citing* Attachment No. 2, § 1.26 at pp. 20-24.

[29] *Id.* at 15, *citing* Attachment No. 2, § 1.23 at p. 20.

limit.[30] Moreover, MCV asserts the Owner Participants' interests are more properly viewed as debt rather than equity. Thus, MCV adds that the sale leaseback transaction will not be used to distribute MCV's profits and losses to Owner Participants. MCV also argues that the Owner Participants' interests under the sale leaseback are akin to the Special Limited Partnership Interests which the Commission viewed as debt in the initial certification of the Midland facility.[31]

MCV also points out that lease payments to the Owner Trustees will essentially be fixed.[32] It also contends that the Special Supplemental Rent is in essence fixed, notwithstanding the entitlement of the Owner Participants to an amount equal to 15 percent of Excess Net Cash, since that entitlement is capped at $300 million over the lease term of 25 years. According to MCV, the $300 million is part of the Owner Participants' return that has been established by having different groups of potential Owner Participants submit proposals to MCV,[33] i.e., that this

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[30] *Id., citing CMS Midland,* 38 FERC ¶ 61,244 (1987); *Beowawe Geothermal Power Co.,* 33 FERC ¶ 62,205 (1985).

[31] In the original application for qualifying status, CMS Midland stated that some of the debt consideration for the transfer of the Net Project might be in the form of a Special Limited Partnership Interest. In evaluating the application, the Commission concluded that these interests were more properly viewed as debt because they did not convey any management rights or entitlements to profits. MCV Application at 16, *citing* 38 FERC at p. 61,828. MCV also notes that there will be no Special Limited Partnership Interests in the event the sale/leaseback transaction is consummated. *Id.*

[32] As noted above, however, the Basic Rent, stipulated loss value and termination value are subject to adjustment if the events assumed in calculating these benefits change. MCV Application at 16, *citing* Attachment No. 2, § 1.21 at pp. 16-18.

[33] MCV indicates that it has been advised by its investment bankers that, in the event that the full $300 million were paid

return is established by the market and is therefore comparable to returns on debt associated with ventures of similar risk. In that regard, MCV contends that payments of Special Supplemental Rent under the leveraged lease represent interest payments, rather than a share of the facility's profits, and that this fact is evidenced by a cap intended to limit the return to Owner Participants to a level unrelated to the profitability of the facility. In contrast, MCV argues, any gain or risk of loss from the facility's operation during the term of the lease will rest entirely with MCV; lease payments will have to be paid before any profits are distributed to MCV partners and, upon liquidation, no assets will be distributed to MCV partners until all debts have been satisfied, including obligations to the Owner Participants under the leases.

MCV also asserts that neither Consumers Power nor any other electric utility entity will enhance its control over the management and operation of the facility by becoming an Owner Participant. MCV states that Owner Participants will acquire no representation on the management committee of MCV or any rights to influence the operation and activities or distribution of profits unless, as noted above, there is a default. Moreover, MCV points out that, as a result of the covenant of quiet enjoyment, the Owner Participants will agree to do nothing to interfere with MCV's use, enjoyment and possession of the facility as long as there is no default.[34]

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in equal installments over the term of the leases, it would increase the annual yield to the Owner Participants by less than 1 percent. *Id.*, n. 19.

[34] Upon default, however, Owner Trustees or Owner Participants can obtain voting control over the management of MCV through MCV Corp. and could repossess the MCV facility or transfer their respective interests in the facility to other parties. MCV maintains that repossession is not unique to the MCV sale/leaseback and has not prevented the Commission in other transactions from either disclaiming jurisdiction over Owner Participants or withholding its certification of other facilities' QF status. MCV Appli-

In its second argument in support of recertification, MCV asserts that regardless of whether the Owner Participants' interests are characterized as debt or equity, the terms of the sale leaseback limit electric utility equity interests as Owner Participants to less than 50 percent. MCV states that if the Commission concludes that the Owner Participants have an equity interest in the facility, this interest must be derived from a diversion of a portion of MCV's equity interest as lessee. Asserting that the total "equity" benefits from the facility are a limited quantity, and that the proposed sale leaseback transaction does not increase them, MCV maintains that any diversion of these benefits to Owner Participants necessarily reduces the amount of benefits flowing to the MCV partners.

MCV acknowledges that, analogous to the lessee in *Allegheny*, it has an equity interest. However, pointing out that CMS Midland's interest in MCV is less than 50 percent, MCV asserts that even if the interests of the Owner Participants are deemed to be equity, there will still be nonutilities who own more than 50 percent of the equity interest if the equity interests of MCV and the Owner Participants are aggregated. Therefore, MCV argues that the facility will satisfy the Commission's ownership requirements regardless of whether the Owner Participants' interests are characterized as equity. To reach any other result, MCV argues, would reduce the total

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cation at 18, n. 21, *citing Hennepin Energy Resource Co.*, 48 FERC ¶ 62,244 (1989). Moreover, MCV acknowledges the Commission's indication that should Owner Participants exercise these default rights, reexamination of the facility's QF status may be required. *Id. citing* 48 FERC at p. 63,326. However, in light of the Applicant's commitment that the utilities' equity participation will be less than 50 percent, MCV contends that the Owner Participants' full exercise of their rights under default should not jeopardize the facility's QF status. Moreover, MCV notes that upon default and dispossession of MCV, CMS Midland's interest in the facility as a lessee through its partnership interest in MCV will have terminated.

MCV benefits that may be received by electric utilities to something below 50 percent. Thus, MCV concludes that should the Commission hold that a certain percentage of the benefits from the MCV facility are flowing to the Owner Participants, then electric utiliites holding such interests should be able to enjoy those benefits to the same extent as CMS Midland would have enjoyed the benefits had they been received by MCV.

MCV asserts that viewing the transactions in this light will not result in control of the facility by electric utility entities as Consumers Power and other electric utilities acting as Owner Participants will not be able to manipulate whatever benefits the Commission might conclude flow to Owner Participants through the proposed sale/leaseback transaction. MCV notes that the variables which determine the Owner Participants' return on their investment will be fixed at the time the sale/leaseback transaction is consummated and cannot be altered. Thus, MCV states, absent default, the Owner Participants will not be involved in any decisions regarding the MCV venture's operation, maintenance, sale of power, or distribution of profits, losses and surplus.

Even in the event of default, MCV argues that, as Owner Participants, Consumers Power and other electric utilities will not be able to control MCV, the facility or its stream of benefits, since the electric utilities will participate on the same terms and conditions as all other Owner Participants with no special advantage or controlling interest. Noting that and voting rights will reflect each Owner Participant's ownership interest, MCV states that the voting rights of electric utility entities will not exceed 50 percent.

The State of Michigan and the Michigan Municipals contend that electric utility entities will indeed hold a greater than 50 percent equity interest in the Midland facility. According to the State, the issuance of the Owner Participant Notes bolsters its argument (in the prior recertification proceeding) that MCV has not com-

plied with the terms of the Commission's initial certification order.[35] The State argues that MCV has never complied with the condition in the original Commission order regarding the Special Interests and has apparently abandoned the Special Interests in favor of notes to be issued to MDC which do vary with the profitability of MCV. Adding that the instant transaction contemplates replacement of the MDC Notes with the Owner Participants Notes, and that a CMS Energy Company (CMS)[36] affiliate will be an Owner Participant, the State also points out that MDC will receive supplemental payments in an amount not to exceed $300 million. As receipt of these funds is linked to the profitability of the MCV enterprise, the State argues that they are more appropriately characterized as equity, rather than debt. As a result, the State concludes, CMS is entitled to more than 50 percent of the profits from the MCV project.

The Michigan Municipals argue that the leveraged lease presents further evidence of MCV's inability to meet Commission guidelines regarding ownership of a QF. The Municipals charge that the current application confirms that benefits to Consumers Power through MDC will vary with the profitability of MCV in a manner inconsistent with the MCV's claim that Consumers Power's share of the "stream of benefits" is limited to 49 percent. For example, under certain conditions, if Consumers Power pays capacity charges in excess of 3.77¢ per kWh, the purchase price paid to MDC will be increased by that amount. According to the Municipals, this requires the Commission to look to the totality of the

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[35] State of Michigan Brief at 12, *citing CMS Midland Inc.*, 38 FERC ¶ 61,244 (1987). As noted in that order, the Commission found that the Special Limited Partnership Interests (Special Interests) to be issued by MCV in consideration for the transfer of the Net Project were debt rather than equity since the level of return would be fixed and not fluctuate with the level of any profit.

[36] CMS is the parent holding company of Consumers Power and CMS Midland.

stream of benefits to discern the benefits flowing to Consumers Power, and this is doubly clear when it is noted that MDC is operating as a Loan Participant and as a holder and seller of Midland assets, and Consumers Power is both a partner/owner of MCV (through CMS Midland) and a purchaser of power from MCV at what Consumers Power says are locked-in conditions.[37]

The Municipals contend in particular that Consumers Power is in effect underwriting this sale through MDC's role as a Loan Participant. Pointing out that MDC will hold all the Subordinated Secured Debt issued by the Owner Trusts, totalling approximately $498 million, and that the Owner Trusts will also issue $730 million of Senior Secured Debt to MDC, accounting for approximately 66 percent of all such debt, they state that MDC will therefore hold approximately 71 percent of the debt issued by the Owner Trusts to finance the purchase of the facility. As the facility will be leased back to MCV, which is allegedly controlled by Consumers Power through CMS Midland, they maintain that either directly or through subsidiaries, Consumers Power is clearly significantly involved in every aspect of this venture.[38]

The Municipals allege that these transactions present real potential for abuse under PURPA's avoided-cost pricing system since such a multiplicity of roles would raise questions even for a utility-owned plant subject to

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[37] Michigan Municipal Motions at 13, *citing* MCV's Answer to the Michigan Municipals' Protest (in Docket No. QF87-237-001) at 38.

[38] As additional evidence of this involvement the Municipals point to Consumers Power's ownership of the facility (both as a partner in the MCV partnership and via an Owner Participant), and its roles in the operation of the facility, the setting of terms for the sale of the electrical output, the setting of terms for the purchase of the electrical output, the setting of terms for (and provider of) the supply of natural gas to the facility, the guaranteeing of the MCV steam supply contract to Dow, and the leasing (as owner) of the MCV facility site to the MCV partnership.

cost-based ratemaking. While a utility dealing at arm's length can ordinarily be expected to seek to ensure that it does not overpay for the electricity it purchases, they maintain that in this case Consumers Power has created incentives to ignore or even encourage overcharges, because it will be able to pass along the artificially inflated prices to its ratepayers while at the same time profiting in its status as co-owner of MCV (among other things) from those excessive charges.

According to the Municipals, MCV's claim that the Owner Participants' interests are debt rather than equity amounts to an attempt to avoid a meaningful examination of a proposed arrangement which has an impact on both ownership or control of the facility. In terms of specific ownership interests and related entitlements, they refer to the fact that the amount of the rent payments may be increased by payment of Social Supplemental Rent of up to 15 percent of the Excess Net Cash (up to a ceiling of $300 million), depending on the extent to which MCV produces more Net Cash than was predicted in the Preliminary Economic Projections.[39] Thus, they contend, the fact that the Owner Participants (including the Consumers Power affiliate) have an interest in the profitability of the facility belies MCV's assertion that this is a simple financing arrangement.

The Municipals contend that only Consumers Power will benefit from any increase in the purchase price. They note that, according to MCV, the purchase price to be paid for the facility will equal the then current fair market value of the portions of the facility to be conveyed, as determined by an independent appraiser,[40] subject to a potential increase of up to $300 million depending on the profitability of the facility. As this increase in the purchase price is to be paid to MDC and not to the other

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[39] Michigan Municipals Motions at 15, *citing* MCV Application, Attachment 2, § 1.17 at p. 15.

[40] *Id.*, *citing* MCV Application, Attachment 2, § 1.12 at pp. 11-12.

partners in MCV,[41] and the prescribed amount of additional consideration is to be paid through the issuance of additional Subordinated Secured Debt to MDC, they maintain that only Consumers Power (through MDC) will benefit from an increase in the purchase price due to increased profitability of the facility, subject to the preservation of the Owner Participants' Net Economic Return. Stating that the transaction is therefore not a simple sale of assets because MDC will share in the profitability of the venture, the Municipals argue that MDC (and therefore Consumers Power) clearly possesses an additional equity interest in the operation of the facility which is not recognized in the nominal 49 percent ownership of MCV by CMS Midland. In other words, they maintain that, as an Owner Participant, Consumers Power will issue notes (through its Owner Trust) to itself (i.e., to its MDC subsidiary) to siphon off the entire benefits, up to $300 million, that would otherwise flow to MCV as a result of an increase in the electricity price to be paid to MCV by Consumers Power, and it is this fact, not the alleged appearance of the transaction, which governs the distinction between debt and equity.

The Municipals also point to the purchase price itself as an additional indication of the "profits" Consumers Power will derive from the transaction which must be included for purposes of calculating equity interests. They acknowledge that the underlying pre-PURPA Midland nuclear plant facilities may have a future "value" of $1.5 billion based upon Consumers Power's willingness to pay PURPA rates to MCV. However, asserting that Consumers Power owns MCV, they state that this is a far cry from suggesting that anyone would build more

[41] The Municipals also argue that this portion of the "stream of benefits" to Consumers Power is separate from (and in addition to) the "stream of benefits" to Consumers Power from the allegedly inflated price of approximately $1.2 billion to be paid to Consumers Power (through MDC) for the Net Project assets even if the capacity charge does not exceed $3.77 per kWh.

than 1,200 MW of gas turbine capacity using $1.5 billion of abandoned nuclear plant facilities unless that person had a financial interest in making use of those abandoned facilities. Arguing that the excess of the $1.5 billion over the reasonable cost of generating facilities reasonably necessary to the project is pure profit to Consumers Power, the Municipals conclude that it must be treated as such in evaluating the "stream of benefits."

The Municipals also charge that Consumers Power itself apparently valued the Midland nuclear plant facilities for tax years 1985 and 1986 on a different basis from what it proposes here. Citing stipulated "True Cash Value" amounts of less than $300 million in local tax proceedings (presented in Appendix C to their motions), the Municipals state that this clearly raises additional factual issues over the amount of the benefits to Consumers Power and appears to confirm that Consumers Power (through MDC) is receiving hundreds of millions of dollars of unrecognized profits.

The Municipals also contend that the cases relied upon by MCV are not relevant and, in any event, the nature of this sale leaseback, along with the involvement of and control by Consumers Power at every stage of the project, distinguishes this case from an ordinary sale leaseback. With regard to the cited cases, they point out that the Owner Participants were independent entities whose only interest was in financing the facility, i.e., a passive investor. In contrast, they argue that Consumers Power is hardly passive given its involvement through affiliates participating as Owner Participants and Loan Participants. They also argue that this sale leaseback is atypical of ordinary sale leasebacks because the leveraged lease arrangement provides incentives for Consumers Power to maximize the amount it pays for electricity from MCV since Consumers Power will receive greater payments (through the alleged "profits" from the sale of assets) in the event of greater MCV profitability. Noting the con-

trast between this relationship and the usual arm's-length dealing found in sale leaseback transactions, they refer to Michigan Commission orders finding Consumers Power has consistently and intentionally engaged in a pattern of self-dealing to the benefit of itself and its shareholders and to the detriment of the public.[42]

With regard to Consumers Power's exercise of control over the Midland facility, the Municipals make one argument. Looking to the proposed transactions, they contend that there are several scenarios in which the voting interest of the Owner Participants in the MCV partnership automatically increases to 99 percent.

MCV responds to the State and the Municipals that they are mistaken in their claim that the Owner Participant Notes constitute an equity interest. Moreover, it adds that, its second principal argument—that electric utility interests in the facility are limited to less than 50 percent —ensures that the sale leaseback transaction does not violate the Commission's equity interest limitation on electric utility ownership. MCV also argues that this limitation prevents Consumers Power and other electric utilities from using their position as Owner Participants to manipulate whatever benefits the Commission might conclude flow to the Owner Partcipants through the sale leaseback.

In response to the Municipals' contentions regarding MDC's role as a Loan Participant, MCV argues that the amount of debt in a QF project held by electric utilities is not restricted in any way by PURPA or the Commission's regulations.[43] In that regard, MCV points out that

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[42] Michigan Municipals Motions at 15, *citing* Michigan Cogeneration Venture Limited Partnership, Michigan Public Service Commission Opinion and Interim Order, Case No. U-8871 *et al.*, January 31, 1989, pp. 98-102.

[43] MCV Answer to the Michigan Municipals at 6, *citing CMS Midland, Inc.*, 38 FERC ¶ 61,244 (1987); *Beowawe Geothermal Power Co.*, 33 FERC ¶ 62,205 (1985).

the debt the Owner Trusts will issue to MDC is simply an assumption by the Owner Trusts of the debt MCV would have issued to MDC as consideration for the Net Project assets transferred to MCV, and the sale/leaseback will not increase the amount of debt held by MDC. Similarly, with regard to possible issuance by the Owner Trusts of additional notes to MDC (in the event the Michigan Commission approves an average-capacity rate for Consumers Power's purchase of MCV power at a rate in excess of 3.77¢ per kWh), MCV states that the Owner Trusts, in agreeing to issue such notes, have again only assumed an obligation that MCV would have to satisfy in the event the sale/leaseback does not proceed and MCV remains the owner of the facility. MCV adds that this adjustment procedure was the subject of an extensive discussion in the prior recertification proceeding.

MCV also states that its application anticipated and addressed the Municipals' characterization of the Owner Participants' interests as equity (because of the provision for Special Supplemental Rent) and the possibility (in the event of default under the leases) that MCV Corp. (whose stock will be pledged to the Owner Participants) will have its voting interest in the MCV partnership increased. Moreover, MCV adds, as noted above, regardless of the merits of the Municipals' argument that the Owner Participants' interests constitute equity, the sale/leaseback, as described in the application, will not adversely affect the facility's compliance with the Commission's electric utility ownership limitations since the limiting of utility-affiliated interests as Owner Participants to less than 50 percent will ensure that the sale/leaseback can not be used to increase the allocation of total project benefits distributed to electric utility-affiliated interests to more than 50 percent.

Discussion

The notice of intervention filed by the Michigan Commission and the timely, unopposed motions to intervene filed by the State of Michigan and the Michigan Municipals serve to make them parties to Docket No. QF87-237-002. We also find good cause has been shown to grant the related requests for intervention in Docket Nos. QF87-237-002 and QF87-237-001 of the parties named in the Michigan Municipals' January 26, 1990 motion to clarify identification of parties. With regard to this docket, the requests were filed within a reasonable time and no party is prejudiced by a grant of intervention. With respect to Docket No. QF87-237-001, there is also no prejudice to other parties as none of the named parties has presented additional claims; however, they must take the record as it existed on January 26, 1990.

We will grant the request for recertification. As described below, we find that the facility will continue to comply with the ownership requirements of our regulations under the proposed sale/leaseback. Further, as we have previously rejected (in our January 31, 1990 order) the requests by the state and the Municipals for consolidated consideration of the applications in this subdocket and the two prior subdockets, we will for the same reason reject the requests here.[44]

In the January 31, 1990 order, we also made clear our views with regard to the nature, effect and scope of a certification proceeding. Specifically, we pointed out that: (1) a certification order is essentially a declaratory order,

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[44] In the course of the prior recertification proceeding, the state filed a motion in Docket No. QF87-237-000 for intervention and declaratory relief or, alternatively, reconsideration (of the decision granting the original certification of the Midland facility). Both requests were denied. *CMS Midland Inc.*, 50 FERC ¶ 61,098, at p. 61,279. In its motion to intervene and protest in this proceeding, the state has incorporated by reference its pleadings in Docket No. QF87-237-001 and specifically sought consolidated consideration of all three subdockets. State of Michigan Brief at 18.

based strictly upon the facts presented although a change in circumstances may not mean that a facility does not meet the qualifying criteria of the Commission's regulations; (2) the qualification is operative on the date the facility first produces electric energy or, if it is already producing energy and seeks recertification based upon certain events proposed to take place, the date when those events actually take place; and (3) the scope of a certification proceeding is narrow, limited to a determination of whether, under the facts presented, the facility will comply with ownership and technical requirements of the Commission's regulations implementing the QF definitions set forth in sections 3(17)-(18) of the FPA,[45] as amended by section 201 of PURPA. 50 FERC ¶ 61,098, at pp. 61,278-279. We also said we were not suggesting that many of the intervenors' arguments may not properly be raised before this Commission, the Michigan Commission or the courts in appropriate proceedings, but that a certification proceeding was not the forum for addressing claims that did not bear on the issues raised within the above-described guidelines. *Id.* at p. 61,278.

We reiterate these points here because, among other things, the intervenors have incorporated by reference the majority of their arguments from Docket No. QF87-237-001 [46] contending, *inter alia*, that the sale/leaseback transactions do not affect the continuing validity of those arguments. Given our disposition of the intervenors' arguments in the prior proceeding, we find that they are irrelevant here. Further, to the extent a similar argument is raised in the context of the transactions presented here for certification, those not discussed below are found to be irrelevant to the issues relating to QF certification.

The instant application presents a narrow issue for our consideration. We have already found that, as of June 2,

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[45] 16 U.S.C. §§ 796(17)-(18) (1988).

[46] In response, MCV has incorporated by reference its own arguments in that proceeding.

1989, when the Midland facility first produced electricity and delivered it to the Consumers Power transmission grid, the structure of the MCV partnership demonstrates that the entitlements of CMS Midland Inc., as a wholly owned subsidiary of Consumers Power, to the stream of benefits from and control of the facility do not exceed 50 percent. Accordingly, we held that the ownership of the facility complied with section 292.206(b) of our regulations [47] since, under the cases interpreting that regulation [48] electric utility entities, as defined above, did not hold an equity interest in the facility of more than 50 percent. Here we are asked whether the transfer of the facility to the Owner Participants, some of which may be electric utility entities, and the leasing back of that facility to MCV, places electric utility entities in a position of holding a greater than 50 percent equity interest in the facility.

1. Ownership

As both MCV and the intervenors point out, this application presents a situation that is in some respects similar to and different from other proceedings where the Commission has considered sale/leaseback transactions. It is similar in that MCV, as lessee, will have an equitable ownership interest in the facility. MCV will have complete possession and control of the facility, and full responsibility for performance of the obligations of the facility under the power purchase, steam sales and other agreements. *Allegheny Electric Cooperative, Inc.*, 47 FERC ¶ 61,015, at pp. 61,054-61,055 (1989); *BRESCO/Wheelabrator*, 40 FERC ¶ 61,366 (1987). It is different in that the Owner Participants and Loan Participants include electric utility entities.

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[47] 18 C.F.R. § 292.206(b) (1989).

[48] *See, e.g., CMS Midland Inc.*, 38 FERC ¶ 61,244 (1987); *Ultrapower 3*, 27 FERC ¶ 61,094 (1984).

MCV argues that the sale leaseback should make no difference in the qualifying status of the facility and that we should exclude the Owner Participants' and the Loan Participants' interests from the ownership analysis and apply the rationale of *Allegheny* and its predecessors to find that the sale leaseback will not disqualify the Midland facility from continuing to hold QF status. The state and the Municipals maintain that the interests of the electrict utility entities as Owner Participants and/or Loan Participants is such that these interests must be counted within the stream of benefits from the facility and, when added to the benefits already acknowledged to be within that stream, provide electric utility entities with a greater-than-50 percent share in the total stream. Additionally, they contend that this positioning of Consumers Power affiliates gives electric utility entities control of the facility contrary to MCV's representations.

We hold that the sale leaseback will not cause the facility to lose its QF status. We agree with MCV's second argument that, without regard to the characterization of the Owner Participants' interests, the allocation of the funds received as revenues by MCV is such that, in any event, electric utility entities will receive no greater than 50 percent of such funds. We also agree that the sale/leaseback will not cause electric utility entities to exceed 50 percent control of the facility. We reach these conclusions based upon the following findings.

We have found in the prior recertification proceeding that the MCV partnership complied with the requirements of our ownership regulations. *CMS Midland Inc.*, 50 FERC ¶ 61,098, at pp. 61,279-282. As a result of the proposed transactions presented in the instant application that structure will change in one limited respect, the admission of MCV Corp. as a general partner, having a .001 percent interest in partnership distributions and, absent default, a one percent voting interest. We find that the MCV partnership standing alone would continue to

meet the ownership requirements of our regulations and the interpreting cases, as the electric utility interest in the stream of benefits from and control of the MCV partnership do not exceed 50 percent.

We also find that electric utilities will not be in a position of having greater than a 50 percent interest in control of the Midland facility. In the first place, subject to the exceptions discussed below, the Owner Participants' return on investment is fixed at the time the sale/leaseback transaction is consummated. They will not be able to manipulate the benefits that flow to them as a result of the transaction; *e.g.*, their rights are specifically limited by the terms of the proposed lease to those ordinarily granted to Owner Partcipants in standard sale/leaseback transactions, as well as being obligated to MCV under the covenant of quiet enjoyment.

The proposed provisions for MCV Corp.'s assumption of a 99 percent voting interest in the event of MCV default under the lease or Consumers Power's deferral of payments under the power purchase agreement in the event of inadequate gas supply to MCV do not disturb our conclusion. If these events occur, the Owner Participants (or the Owner Trusts on their behalf) can obtain voting control over the management of MCV since MCV Corp. stock is to be pledged to them pursuant to the terms of the proposed sale/leaseback transaction.[49] However, as noted above, the repossession rights are not unique to this transaction and the Commission has found that such unexercised rights do not bar QF status. Should these rights be exercised, reexamination of the facility's QF status may be required. *Hennepin Energy Resource Company (Hennepin)*, 48 FERC ¶ 62,244 (1989); *BRESCO/Wheelabrator*, 40 FERC ¶ 61,366 (1987).

In *Hennepin*, it was found that pledges of assets, including rights under existing energy sales agreements as

[49] MCV Application, Attachment 2, § 1.4 at p. 2.

security for payment and performance by the lessee of its obligations under the lease were for security purposes only, and did not constitute a present assignment of any such rights. 48 FERC at p. 63,326. Accordingly, consistent with *BRESCO* it was concluded there was no present assignment of rights to the Owner Trustee. *Id.* We believe the same is true here. The operation of these provisions, like the agreement in *Hennepin*, provides that, as security in an event of default, the Owner Participants or the Owner Trusts will in essence step into the shoes of MCV, but only in the event of the enumerated situations. Accordingly, as in *Hennepin*, and *BRESCO*, we find that this provision will convey no *present* interest in control of the facility.

MCV also points out, however, that less than 50 percent of the Owner Participants' group will be electric utility entities. Accordingly, they maintain, in the event of a default, the facility's QF status will not be jeopardized.

We agree with that conclusion. This limitation on the composition of the Owner Participants' group ensures that the 50 percent equity interest limitation is met regardless of the characterization of the Owner Participants' interests. Accordingly, under no circumstance can we find that control of the facility by electric utility entities will exceed 50 percent.

In the prior recertification we also held that the financial transaction surrounding the formation and development of the MCV facility did not result in a violation of the ownership regulations. Specifically, we found that the potential fluctuation in the amount of the notes to be issued by MCV to MDC as consideration for the transfer of the Net Project assets reflected an agreed-to adjustment in the purchase price (contingent, *inter alia*, upon Michigan Commission approval of a capacity price above 3.77¢ per kWh) between MDC and the non-CMS partners in MCV. As a result we further found that the MDC Notes did not provide MDC with profits from the op-

eration of the facility and were therefore to be considered as debt rather than equity. Based upon those findings we held that MDC (and therefore Consumers Power) was not entitled to an equity interest which, when aggregated with Consumers Powers' interests in MCV (through its CMS Midland affiliate) would exceed 50 percent.[50]

The State and the Michigan Municipals suggest that MDC's holding of a major portion of the Owner Participant debt and the provision for issuance of additional notes in an amount of up to $300 million to MDC in the event the Michigan Commission approves a capacity price payable to MCV above 3.77¢ per kWh again provides a means by which a Consumers Power affiliate will be holding an equity interest which, together with the interests of CMS Midland (and, in this instance, those of the other electric utility entities that will be Owner Participants) tip the equity scales in favor of electric utility entities. However, we agree with MCV that the Owner Participant Notes are simply an assumption by the Owner Trusts (acting on behalf of the Owner Participants) of the debt the partnership would have issued to MDC in the absence of the sale/leaseback and, similarly, that the possible issuance of additional notes represents an assumption of the same obligation that would have been placed on MCV in the event the Michigan Commission approved a capacity price above 3.77¢ per kWh. MCV has pointed out that the agreement on the proposed sale/leaseback terms was the product of negotiations that included presentations by different groups of potential Owner Participants, i.e., these terms as well as the returns are market based. Thus, MDC's role in this regard has not really changed. Accordingly, its role as a Loan Participant does not provide any additional benefits which must be included within the stream.[51]

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[50] *CMS Midland, Inc.*, 50 FERC ¶ 61,098, at pp. 61,285-286.

[51] As noted, the state also maintains that MCV is in violation of the original certification since it is not utilizing the Special

The issue which remains is whether the interests of the electric utility Owner Participants, as a result of the provisions for Special Supplemental Rent, variance of the purchase price or the allegated overvaluation of the project assets, constitute an equity interest that would cause the total electric utility equity interest in the Midland facility to exceed 50 percent. As described above, the potential fluctuation in the purchase price, which will be reflected by an increase in the amount of the Owner Participant Notes, is no different in substance than the potential fluctuation in the amount of the MDC Notes that was found acceptable in our January 31, 1990 order. Likewise, the question of valuation has already been addressed in our prior order, i.e., the price agreed to was the product of market-based negotiation.

We do not believe it is necessary to go beyond this point in attempting to define the Owner Participants' interests as debt or equity, however. As MCV points out, electric utility entities will not constitute more than 50 percent of the Owner Participant group. Likewise, electric utility interests in MCV do not exceed that limit. The stream of benefits is bounded by the revenues received by MCV for the production of electricity and steam and tax benefits flowing to MCV. Since CMS Midland and MCV Corp., absent default, can receive no more than 50 percent of the MCV stream of benefits and electric utility entities will have a claim to no more than 50 percent of any benefits flowing to the Owner Participants, no matter how the latters' interests are viewed, the sum total of the electric utility entities' share of the stream at this point cannot exceed 50 percent. Thus, the sale/leaseback transaction will not provide electric utility entities a

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Interests (which were held to be comparable to debt) and has substituted a note structure that is really an equity interest. However, in that proceeding it was indicated that some or all of the debt financing might be accomplished by use of the Special Interests. *CMS Midland Inc.*, 38 FERC at p. 61,828. Moreover, this issue is effectively mooted by our January 31, 1990 order on recertification.

greater than 50 percent interest in the stream of benefits from and control of the Midland facility, thereby satisfying the equity interest limitation of our regulations.

2. Other Issues

a. *MCV 2/Competition*

The state also contends that approval of the instant application may implicitly approve a second Midland facility, and that will effectively stifle competition in Michigan at least through the end of the century. According to the state, a review of the application's attachments in conjunction with the prior recertification application reveals that the former extends much further than a refinancing of the facility. Referring specifically to a description in Attachment 2 of financing arrangements for "MCV 2"—a proposed second phase of salvaging the Midland Nuclear Plant facilities—the state says that the two current recertification applications may seek approval on a piecemeal basis but the total project would not be approved if reviewed on a consolidated basis.

According to the state, the instant application seeks approval of a leveraged lease transaction that would allow the financing and creation of "MCV 2"—a new generation facility at the site of the current MCV facility in Midland which would greatly increase the market power of CMS/MCV.[52] The "MCV 2" facility would use the backup steam turbine unit (No. 2) of the facility certified on January 31, 1990 and add 15 to 18 additional gas combustion turbines with heat recovery boilers (assuming the same size in the current conversion) for a combined additional capacity of roughly 2000 megawatts.[53] If "MCV 2" were approved by the Commission via approval of the leveraged lease application, the state main-

[52] *Id.* citing MCV Application, Attachment 2 at 57-60.

[53] *Id.* at 7, *citing* Appendix A, Remarks of William McCormick to the New York Society of Security Analysts, October 20, 1988.

tains that this would more than double the size of what is already the largest gas-fired cogeneration project in the world.

The state next refers to what it alleges is a diminution in competition in Michigan brought about by MCV. Contending that one of the primary purposes of PURPA was the development of competition and diversity in the companies that produce electricity in a given market and that the Commission has already recognized the benefits of competition more generally,[54] the state argues that the instant application threatens the regulatory goal of promoting competition. Referring specifically to proceedings before the Michigan Commission regarding capacity pricing and allocation, the state notes that Commission's most recent finding that, based on Consumers Power's refusal to comply with the Commission's initial order, there is no alternative but to increase the amount of capacity which Consumers Power could purchase from MCV—at the expense of other projects. The proposed "MCV 2" only increases the probability that more cogeneration projects that might compete in Michigan will also be squeezed out of the market, the state adds, arguing that the result will be a further diminution of competition in violation of PURPA, and in contravention of the FERC's policy of encouraging competition.

MCV responds that it is not seeking approval or certification of "MCV 2" and disagrees with the state that a grant of the instant application could be construed in any fashion as either explicit or implicit approval of any generation beyond that which has previously been certified as a QF by the Commission and is the subject of Docket No. QF87-237-002. According to MCV, the sole purpose of the provision in the term sheet referenced by the state is to prevent the proposed sale/leaseback from foreclosing the option of expanding generation capacity at the site

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[54] State of Michigan Brief at 5-6, *citing Public Service Company of Indiana*, 49 FERC ¶ 61,346 (1989).

of the facility at some future date. MCV also argues that the market impact of MCV's operation as a QF and the potential for expanding capacity at the facility's site are irrelevant to whether MCV's status as a QF would be adversely affected by the proposed sale/leaseback—which is an inquiry that must focus on whether limiting electric utility-affiliated interests to less than 50 percent ensures that the facility's status as a QF is not adversely affected by the sale/leaseback transaction. The state may be dissatisfied with market consequences of MCV's operation as a QF, MCV adds, but these concerns have nothing to do with whether the facility is a QF until such time as Congress amends PURPA.

MCV also notes a lack of cited authority for the state's assertion that one of the primary purposes of enacting PURPA was the development of competition, and argues that promotion of competition was not one of the reasons for enacting the statute. Rather, MCV adds, PURPA was enacted to encourage cogeneration and small power production, energy conservation, the efficient use of facilities and resources by electric utilities and equitable rates for electric consumers.[55]

Our review of the cited sections of Attachment 2 as well as the entire application confirms MCV's assertions regarding the so-called "MCV 2" facility. When and if MCV seeks Commission certification of the second phase of the Midland nuclear plant conversion, it can only be on the basis of an application setting forth facts which demonstrate full compliance of that facility with both the ownership and technical requirements of our regulations implementing PURPA. The limited reference to "MCV 2" in the term sheet presents no such attempt. Rather, as MCV contends, it appears only to avoid foreclosing the option of expanding capacity at the Midland site at some future date.

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[55] MCV Answer to the State of Michigan Brief at 4-5, n. 4, *citing*, 16 U.S.C. § 2611 (1988) and 15 U.S.C. § 3201 (1988).

Finally, with regard to competition issues, as we emphasized in our January 31, 1990 order granting the prior recertification, the scope of a certification proceeding is quite narrow and review of issues relating to competition fall outside that scope and are more appropriately addressed in other proceedings.[56]

b. *The Record*

The state and the Municipals also note what they consider to be deficiencies in the record. The state points out that MCV has not filed most of the transaction documents that will comprise the new financial structure of the MCV and says that it is therefore difficult to determine the precise structure of the proposed refinancing. Additionally, the state says that Attachment 2 to the application contains references to a number of transaction documents and agreements that are not included and, to its knowledge, have not been submitted to the FERC. For example, it states that Michigan and the FERC should have access to the independent appraiser's report referenced in Attachment 2 prior to making a final determination as to the appropriateness of the leveraged lease transaction. Additionally, the state argues that the Participation Agreement and the Leveraged Lease Agreement itself should be provided to the parties so that a more informed assessment of the proposed recertification application can take place, and the FERC should not be required to pass judgment upon the application until these additional documents are provided and the parties have an opportuity to comment.

The Municipals point out that the application does not identify the planned Owner Participants, allegedly making it impossible to determine the percentage of utility control or ownership. The Municipals add that the uncertainty about the accuracy of prior MCV and Consumers Power statements concerning ownership and control of the

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[56] *CMS Midland, Inc.*, 50 FERC ¶ 61,098, at pp. 61,297-298.

MCV, as well as the history of the lack of arm's-length negotiations, dictate that MCV's statement that utility interest in the ownership of the facility "will never equal or exceed 50 percent" cannot be taken at face value. Rather, they contend that a hearing is necessary to elicit such essential facts.

The Municipals also note that MCV has not presented the underlying contracts among itself and its prospective owners. However, on information and belief, they allege that these contracts would add to the evidence that Consumers Power does and will effectively control MCV.

MCV reiterates its statements in the application that the details of the proposed transaction are still the subject of ongoing negotiations. However, MCV adds, the "final draft" of the term sheet attached to the application contains all of the information the Commission needs to assess the sale/leaseback's compliance with the Commission's regulations limiting electric utility ownership of QFs. While certain details may change, such as the number of Owner Participants, MCV states that the critical features, such as the limitation on electric utility entity participation as Owner Participants to less than 50 percent, remain fixed and are not the subject of negotiations.

We find that the application and the attachments provide an adequate basis for our decision. MCV has represented in the application and provided in the term sheet that electric utility participation at the Owner Participant level will not exceed 50 percent. Based upon this representation we have found above that the Owner Participant limitation will cause the facility to remain in compliance with our ownership regulations. As we stated in the prior recertification order, a QF certification order is essentially a declaratory order and qualification takes place upon the happening of the facts which were represented to transpire.[57] While the final details of the

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[57] *CMS Midland Inc.*, 50 FERC ¶ 61,098, at pp. 61,277-278.

transactions are not in place, according to MCV they will follow along the represented lines. Examination of other documents at this point will not change this fact. Accordingly, the examination sought by the state and the Municipals is unnecessary.

c. *Self-Dealing—The NOPR*

The Municipals make one further argument, that the self-dealing that allegedly forms the core of the transactions underlying the two MCV recertification applications represents the type of abuses which the Commission has proposed to curb in its Notice of Proposed Rulemaking in Docket No. RM88-17-000 (NOPR).[58] The Municipals argue that the Commission recognized in the NOPR that the potential for abuse of monopoly power through self-dealing may be incompletely protected by its interpretation of the ownership/benefit/control issues. The Municipals add that the worst fears expressed in the NOPR have been proven by the MCV project. Specifically referring to Commission concern with abuse of monopoly power via self-dealing where a utility may favor its own subsidiary over others and that the means by which such favoritism may be expressed range from the simple to the exceedingly complex, the Municipals state that the "cascade of documents" surrounding the MCV transactions establishes the indisputable complexity of this particular project, which nevertheless must not be allowed to evade the regulatory process.

The Municipals note the Commission's statements in the NOPR (with regard to self-dealing transactions) that: (1) while the price paid to an affiliate may be no higher, other contract terms may be more favorable than those granted to nonaffiliates; or (2) self-dealing concerns may also arise in the duration of contract negotiations; or (3)

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[58] Regulations Governing the Public Utility Regulatory Policies Act of 1978, Notice of Proposed Rulemaking, *FERC Statutes and Regulations* ¶ 32,465, 53 Fed. Reg. 31,021 (August 17, 1989).

for states that set avoided costs administratively, a utility subsidiary could be placed "first in line" to avoid the next increment of capacity, thus potentially skewing the payments in favor of its own interest.[59] Additionally, they point out the Commission's perception that the potential for abuse of monopoly power through self-dealing may extend to circumstances beyond the construction of the QF; for example, a utility might be more lenient in enforcing performance standards upon its subsidiary than upon its nonaffiliated QFs, or, if QF contracts call for dispatchable power, a utility might self-deal by dispatching its own facilities preferentially.[60]

Citing the Commission's concern that regulators could face an extremely complicated task in unraveling the utility's motives and might never be able to identify abuses due to self-dealing from the reasonable exercise of management discretion, the Municipals state that the MCV project shows how electric utility ownership and self-dealing would undermine the purposes and objectives of PURPA. Similarly, they state that it is an example of the Commission's concern with how the abuse of monopoly power through self-dealing may serve to discourage the development of unaffiliated QF's. Where the potential for self-dealing exists, the Commission's ownership examination requires additional scrutiny, the Municipals argue. In that regard, pointing out that the Commission has been established to protect the public from the exercise and abuse of monopoly power, and against excessive consumer rates and charges, the Municipals maintain that the manifest possibility for abuse in the MCV case means approval without investigation would invite the sale by Consumers Power through MCV from pre-PURPA facilities at above cost, contrary to the Federal Power Act, and the sale/leaseback shows how far the project has been changed from that originally certified and merely

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[59] *Id.* at pp. 32,300-01.

[60] *Id.*

invites an added mechanism for profit to Consumers Power.

MCV responds that this is the first time the Municipals have quoted extensively from the Commission's proposed rulemaking (that solicited comments regarding self-dealing) to bolster their argument that Consumers Power's involvement in MCV should somehow taint the facility's status as a QF. However, MCV adds, the Municipals have neglected to quote the Commission's conclusion in its introduction of this topic in the NOPR that:

> "[A]lthough the Commission recognizes that certain problems have been raised concerning the Commission's current ownership rules, *we do not believe that we have an adequate basis at this time to conclude that any change is warranted.* The existing rule appears to represent a reasonable compromise between all of the interests involved in the QF industry." [61]

MCV states that the proceeding should not therefore be expanded to include issues unrelated to the sale/leaseback's compliance with the Commission's current regulations limiting utility ownership in order to address more generic concerns regarding self-dealing and affiliated transactions. In the first place, MCV adds, it would be inequitable for the Commission to apply any new policy regarding ownership that deprives MCV of its QF status, and the Commission was well aware of Consumers Power's involvement in MCV at the time it originally certified the facility's QF status on March 4, 1987. Second, MCV argues that the Commission already has underway a rulemaking that focuses on the alleged abuses due to self-dealing, and any modification to the Commission's current ownership regulations should occur in that rulemaking where the Commission has before it all of the relevant information

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[61] MCV Answer to Michigan Municipals Motions at 4, *citing FERC Statutes and Regulations* ¶ 32,465, at p. 32,302. (emphasis in MCV Answer).

rather than piecemeal in an individual case that is limited in scope.

The simple answer to the state's and the Municipals' charges on self-dealing is that a Notice of Proposed Rulemaking is not a final rule. While the Commission may have made certain preliminary observations in Docket No. RM88-17-000, the Commission did not in the NOPR reach any final conclusions. Nor could the Commission do so, since such action would violate the purpose of seeking comment from interested parties on the proposed rule. The proposed rule did not change our current ownership regulation; the regulation on which our decision is based.

Finally, we reiterate the statement in our prior order. Most of the alleged abuses are simply not relevant to a certification proceeding. However, this does not mean that they may not be pursued in other proceedings before this Commission, the State Commission, or the courts.

The Commission orders:

(A) The motions to consolidate Docket Nos. QF87-237-000, QF87-237-001 and QF87-237-002 are hereby denied.

(B) The application for recertification of qualifying status filed on November 14, 1989 by Midland Cogeneration Venture, L.P., pursuant to section 292.207 of the Commission's regulations and section 3(18)(B) of the Federal Power Act, as amended by section 201 of the Public Utility Regulatory Policies Act of 1978, is hereby granted, provided the facility operates in the manner described in the application.[62]

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[62] Certification as a qualifying facility serves only to establish eligibility for benefits provided by the Public Utility Regulatory Policies Act of 1978, as implemented by the Commission's regulations. 18 C.F.R. Part 292 (1989). It does not relieve a facility of any other requirements of local, state or federal law, including those regarding siting, construction, operation, licensing and pollution abatement. Certification does not establish any property right, resolve competing claims for a site, or authorize construction.

APPENDIX F

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. QF87-237-003, QF87-237-000,
and QF87-237-001

CMS MIDLAND, INC., MIDLAND COGENERATION
VENTURE LIMITED PARTNERSHIP

ORDER DENYING REQUEST FOR REHEARING, REJECTING SUPPLEMENTAL FILINGS AND DENYING MOTION FOR STAY

(Issued July 31, 1991)

Before Commissioners: Martin L. Allday, Chairman; Charles A. Trabandt, Elizabeth Anne Moler, Jerry J. Langdon and Branko Terzic.

Background

On March 2, 1990, the Michigan Municipal cooperative Group (the Municipals)[1] and the State of Michigan, acting through its Attorney General (Michigan and, collectively with the Municipals, the Intervenors), filed a joint request for rehearing (the Joint Rehearing) of the Commission's January 31, 1990 order in Docket Nos. QF87-237-000 and QF87-237-001 (the January 31 or-

[1] The Municipals have stated that, for purposes of this proceeding, the group consists of virtually all of the publicly owned municipal and cooperative electric systems in Michigan's lower peninsula. *See CMS Midland, Inc. et al.*, 50 FERC ¶ 61,098, at p. 61,267 n.4 (1990) (listing the participating systems).

der).[2] In that order, the Commission granted the application of Midland Cogeneration Venture Limited Partnership (MCV for recertification of a topping-cycle cogeneration facility located in Midland, Michigan as a qualifying cogeneration facility (QF) under section 3(18)(B) of the Federal Power Act (FPA), as amended by section 201 of the Public Utility Regulatory Policies Act of 1978 (PURPA), and the Commission's regulations thereunder.

In the Joint Rehearing, the Intervenors assert nine grounds for rehearing. We will discuss the Intervenors' arguments below in such detail as is necessary or appropriate to their disposition. We nevertheless summarize the issues here as they are characterized by the Intervenors:

1. The Commission should consider the impact of its alleged deregulation of the MCV plant, which the Intervenors argue is really a Consumers Power Company (Consumers) plant.

2. Consumers owns and controls MCV.

3. The Commission erred in permitting MCV to obtain QF status, because the facility was constructed prior to the effective date of PURPA.

4. MCV does not meet PURPA efficiency standards.

5. The Commission is required to hold a hearing.

6. The fact that MCV was certified initially as a QF does not justify recertification.

7. The Commission's grant of a waiver of its certification requirements is inappropriate.

8. MCV may be a utility, because it allegedly will make retail sales.

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[2] 50 FERC ¶ 61,098 (1990).

9. The consolidation with Docket No. QF87-237-002 should have been granted.

On March 15, 1990, the Municipals filed a motion for stay and suggestion for oral argument (the Motion for Stay). The motion seeks to stay the effectiveness of both the January 31 order and the Commission's March 1, 1990 order in Docket Nos. QF87-237-002, QF87-237-001, and QF87-237-000 (the March 1 Order).[3] The Motion to Stay also requests that the Commission: (1) order MCV and Consumers to prevent distribution of the proceeds of notes attributable to or associated with the sale of certain Midland nuclear plant assets (which became part of the Midland cogeneration facility) without prior Commission approval, with certain exceptions; and (2) grant such other (unspecified) relief "as may be found to be appropriate."[4] On March 28, 1990, MCV filed an answer in opposition to the Motion to Stay.[5]

The Commission issued an order on April 2, 1990 granting the Joint Rehearing for the limited purpose of further consideration.[6]

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[3] *Midland Cogeneration Venture, L.P.*, 50 FERC ¶ 61,259 (1990). In the March 1 order, the Commission granted MCV's application for a second recertification of the Midland facility to reflect a change in its ownership resulting from a sale/leaseback of the facility as part of its long-term financing. *See infra* note 6 (explaining that we will consider requests for rehearing of the March 1 order in a separate order).

[4] Motion to Stay at 9-10.

[5] MCV did not file an answer to the Joint Rehearing. Our Rules of Practice and Procedure (Rules) expressly prohibit anwers to requests for rehearing. Rule 713(d)(1), 18 C.F.R. § 385.713(d)(1) (1991).

[6] Also on April 2, 1990, Michigan and the Municipals filed separate requests for rehearing of the Commission's March 1 order (respectively, the Michigan Rehearing and the Municipals Rehearing). Each rehearing requests, *inter alia*, the consolidation of the recertification proceedings in Docket Nos. QF87-237-001 and QF87-237-002. Michigan requests the inclusion as well of Docket No.

On June 1, 1990, the Municipals filed a document entitled "Supplement to Applications for Rehearing" (Municipals Supplement).[7] The thrust of the Municipals Supplement is providing additional support, beyond that supplied in the Joint Rehearing, for the argument that the MCV facility is owned or controlled by Consumers. MCV filed an answer in opposition to the Municipals Supplement on June 18, 1990, arguing that the Municipals Supplement constitutes an impermissible attempt to expand the statutory deadline for filing rehearing applications. MCV argues in the alternative that the Municipals Supplement does not present any argument of merit or relevance that could justify rehearing any aspect of either the January 31 order or the March 1 order.

The Municipals Supplement includes a reference to anticipated Consumers sales to Ontario Hydro of MCV electricity purchased by Consumers, documentation of which the Municipals expected to file shortly. On July 13, 1990, the Municipals submitted a "Notice of Filing" (Municipals Notice of Filing), attaching certain contracts relating to the Ontario Hydro sales. The Municipals identified the attachments as Appendix J to the Municipals Supplement. MCV filed an answer in opposition to the Municipals Notice of Filing on July 27, 1990, arguing that it should be rejected for essentially the same reasons as those urged by MCV for the rejection of the Municipals Supplement. MCV urges rejection for the additional reason that the Municipals Notice of Filing,

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QF87-237-000, in which the original certification as a QF was granted to the Midland facility in 1987. *CMS Midland, Inc.*, 38 FERC ¶ 61,244 (1987).

On May 2, 1990, we granted the requests for rehearing of the March 1 order for the limited purpose of further consideration. We will address the merits of the Michigan Rehearing and the Municipals Rehearing in a separate order.

[7] This document, and each subsequent supplemental filing by either or both of the Intervenors, is directed to the requests for rehearing of both the January 31 order and the March 1 order.

according to MCV, represents an impermissible answer to an answer.

On July 30, 1990, counsel for the Municipals submitted a letter to the Secretary of the Commission requesting that the Commission address the rehearing applications as expeditiously as possible.

On February 11, 1991, Michigan and the Municipals filed a document styled a "Supplemental Brief in Support of the State of Michigan's and the Michigan Municipal Cooperative Group's Applications for Rehearing and Motion for a Decision" (Joint Supplemental Brief). MCV filed an answer in opposition to the Joint Supplemental Brief on February 26, 1991, asserting that it should be rejected as impermissible, as insufficient to justify reopening the record or as irrelevant.

On June 6, 1991, the Intervenors submitted a document entitled "Renewed Motion for Commission Decision on Applications for Rehearing and Motion to Lodge Decisions and Other Relevant Material" (Motion to Lodge). The Intervenors argue, among other things, that the three Michigan Public Service Commission (Michigan Commission) decisions they seek to lodge compel the Commission to conclude that MCV is controlled by Consumers. MCV filed an answer in opposition to the Motion to Lodge on June 21, 1991, arguing that it really is another, allegedly impermissible attempt to supplement the Intervenors' requests for rehearings. MCV thus argues that the Motion to Lodge should be rejected along with the earlier supplements.[8]

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[8] MCV does not oppose the Motion to Lodge to the extent that it moves for decisions on the Intervenors' requests for rehearings.

Discussion

I. Decision Summary

We will deny the Joint Rehearing of Michigan and the Municipals of our recertification order of January 31, 1990. We also will deny the motion by the Municipals for a stay of the January 31 order and the March 1 order. We will further reject (1) the Municipals Supplement, (2) the Municipals Notice of Filing, (3) the Joint Supplemental Brief and (4) the Motion to Lodge (collectively, the Supplemental Filings).

As we explain more fully in the discussion that follows, we cannot accept the Supplemental Filings, as we have no authority to accept materials in support of rehearing applications if such materials are filed after the 30-day statutory deadline for submitting rehearing applications. Moreover, even if we were permitted to accept the Supplemental Filings or if were to accept them under the guise of motions to reopen the record or other proper motions, none of the arguments contained in or materials submitted with the Supplemental Filings would cause us to alter our January 31 order.[9]

We will dismiss as moot the various requests in the Supplemental Filings for a decision on the Joint Rehearing and the Motion for Stay. Finally, we will reject the various requests in the Joint Rehearing, the Motion for Stay and the Supplemental Filings for a hearing and oral argument. In view of our disposition of the issues raised by the Intervenors, we do not believe that further argument is necessary.

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[9] In the instant order, we specifically discuss only portions of the Supplemental Filings that argue for rehearing of the January 31 order. We will discuss remaining substantive portions of the Supplemental Filings that relate to the March 1 order, to the extent we deem necessary or appropriate, in our order ruling on the merits of the requests for rehearing of our March 1 order.

II. Preliminary Issues

We begin our discussion by restating certain principles regarding the nature, effect and scope of a QF certification proceeding. These principles have guided our consideration of the Joint Rehearing, the Motion for Stay and the Supplemental Filings. First, a QF certification order is essentially a declaratory order, based strictly on the facts presented. Second, the scope of a QF certification proceeding is narrow, being limited to a determination whether, under the facts presented, the facility will comply with the Commission's ownership and technical requirements.[10]

We reiterate these points here because the Intervenors' arguments on rehearing constitute little more than a rehashing of their original arguments in this recertification proceeding. While those original arguments are in some instances expressed in new phraseology [11] and are in other instances bolstered by cumulative and even duplicative [12]

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[10] *See* 50 FERC at pp. 61,277-78. *Accord, e.g., Inter-Power of New York, Inc.*, 55 FERC ¶ 61,387, at p. 62,179 (1991); *Georgetown Cogeneration, L.P.*, 54 FERC ¶ 61,049, at pp. 61,184-85, *reh'g denied*. 55 FERC ¶ 61,038 (1991).

[11] For example, the Municipals argued in their motion to intervene in opposition to recertification that a allegedly excessive gas profits arising from Consumers' negotiations of gas purchase contracts constitute a benefit to Consumers that must be taken into account in calculating the extent of utility ownership of the facility. *See* 50 FERC at pp. 61,288, 61,290. On rehearing, those same gas profits have gone from being merely excessive to constituting "winfall profits" for Consumers. *See* Joint Rehearing at 5.

[12] Attachment A to the Joint Rehearing, for example, is a transcript of an October 20, 1988 presentation by CMS Energy Corporation (the electric utility holding company that owns Consumers) (CMS Energy) to the New York Society of Security Analysts. The same transcript is Appendix A to the Municipals' January 12, 1990 Answer to MCV's Motion for Expedited Treatment. Similarly, Appendix B to the Municipals Supplement is an excerpt from a January 31, 1989 Michigan Commission opinion. The same ex-

documentation, they remain on rehearing essentially the same arguments that we considered and rejected in our January 31 order. For essentially the same reasons as we expressed in our January 31 order, we considered and reject those arguments on rehearing as well.

The Intervenors also incorporate by reference their arguments in their various filings in the initial recertification proceeding.[13] Given our disposition of the Intervenors' original arguments in our January 31 order, we see no need to repeat here our analysis of those arguments. We summarily deny the Joint Rehearing, therefore, to the extent that it incorporates by reference the Intervenors' prior arguments. We also summarily deny rehearing of the specific issue whether or not the request for consolidation of this recertification proceeding with that in Docket No. QF87-237-002 should have been granted.[14] We fully considered and rejected that issue in the January 31 order,[15] and the Joint Rehearing contains nothing that persuades us to decide otherwise. Additionally, all other arguments of the Intervenors not specifically addressed below should be deemed denied as duplicative or irrelevant, or both.

We also point out again [16] that our rejection of the Intervenors' arguments in this QF recertification proceeding does not preclude the possibility that some of those argu-

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cerpt is included in Appendix E to Michigan's November 28, 1989 Brief in Support of Motion for Intervention, Request for Evidentiary Hearing and in Opposition to the MCV's Request for Recertification. In neither instance do the Intervenors in their rehearing papers advise the Commission that the materials have been previously considered (and rejected) in this proceeding.

[13] *See* Joint Rehearing at 10, 47.

[14] *See* Joint Rehearing at 46.

[15] *See* 50 FERC at pp. 61,278-79.

[16] *See* 50 FERC at p. 61,278. *See also Midland Cogeneration Venture*, 50 FERC at p. 61,801.

ments may be properly raised in other proceedings before the Commission, the Michigan Commission or the courts. Indeed, the Intervenors' submissions on rehearing demonstrate that many of the Intervenors' arguments here also have been and continue to be vigorously pressed before the Michigan Commission and the courts of Michigan.[17] Such arguments, however—whatever their merits may or may not be for other purposes—simply have no relevance to this proceeding, which focuses on the statutory and regulatory requirements for a qualifying cogeneration facility.

III. The Supplemental Filings

We must reject the Intervenors' Supplemental Filings as untimely attempts to enlarge upon the timely filed Joint Rehearing.[18] We simply have no statutory authority to accept such late submissions, even when filed in support of timely filed requests for rehearing. As we have had previous occasion to point out,

> [p]ursuant to section 313(a) of the Federal Power Act, 16 U.S.C. § 8251(a), requests for rehearing must be filed no later than 30 days after the issuance

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[17] *See, e.g.*, Appendices A (May 23, 1990 Michigan Commission Opinion and order), B (January 31, 1989 Michigan Commission Opinion and interim order), D (May 23, 1990 Michigan Court of Appeals order) and H (May 3, 1990 Michigan Commission Opinion and order) to Municipals Supplement; Attachment K (August 3, 1990 Michigan Commission Opinion) to Joint Supplemental Brief; Items A, B and C (each a May 7, 1991 Michigan Commission Opinion and order) to Motion to Lodge. We emphasize, however, that nothing in the instant order is in any way dependent upon or governed by any action or decision of the Michigan Commission or the final outcome of any judicial appeals of any such action or decision.

[18] We recognize that the Intervenors have styled one of the Supplemental Filings a "Motion to Lodge," which can be a proper, permissible motion, but, as we explain below, we are neither inclined nor obliged to accept a filing solely on the strength of its party-bestowed title.

> of an order. Any subsequent filing supplementing or revising that request is in essence a new request for rehearing and thereby precluded under section 313 (a) of the Act.[19]

Filing within the 30-day period is a jurisdictional prerequisite for rehearings; we therefore have no authority to waive the statutory jurisdictional requirement by extending the time for filing rehearing materials.[20]

We have, nonetheless, examined the Supplemental Filings for the purpose of determining whether we should accept the materials as something other than impermissible late supplements to the Joint Rehearing. In other words, we have examined whether we should accept the Supplemental Filings as motions to reopen the record, motions for reconsideration or otherwise.[21] We have undertaken this examination notwithstanding that the Intervenors offer us few suggestions as to why or under what authority we should or could accept any or all of the four Supplemental Filings.

The Municipals argue in a footnote in the Municipals Supplement that the materials referred to in the filing are

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[19] *Borough of Weatherly, Pennsylvania*, 32 FERC ¶ 61,398, at p. 61,892 (1985). *Accord, e.g., Public Service Co. of New Hampshire*, Docket No. ER91-143-001 *et al.*, slip op. at 7, 56 FERC ¶ 61,105 (1991); *Commonwealth Electric Co. v. Boston Edison Co.*, 46 FERC ¶ 61,253, at p. 61,757, *reh'g denied*, 47 FERC ¶ 61,118 (1989).

[20] *See, e.g., Boston Gas Co. v. FERC*, 575 F.2d 975 (1st Cir. 1978) (denying petition for review without reaching merits because petitioner failed to file rehearing application before Commission within 30 days); *Columbia Gas Transmission Corp.*, 40 FERC ¶ 61,195, at p. 61,655 (1987) (rejecting late-filed supplement to rehearing application without reaching merits of supplement).

[21] *See Commonwealth Electric Co.*, 46 FERC at p. 61,757 & n.6 (citing *Cooley v. FERC*, 843 F.2d 1464 (D.C. Cir.), *cert. denied*, 488 U.S. 933 (1988), for the proposition that late-filed evidence could be considered as part of a petition to reopen the record).

all relevant to the Commission decision and were all published "after rehearing." The Municipals add that "if" a formal motion is necessary, the Municipals "so request[], pursuant to Rules 212, 713 and 716, 18 C.F.R. §§ 385.212, 385.713 and 385.716." [22] The Municipals explain neither why they think that the Commission's Rules authorize the Municipals Supplement nor how they think the pleading satisfies our requirements for reopening the record. Moreover, the putative justification that the materials all were published "after rehearing"—which we take to mean after the March 2, 1990 filing of the Joint Rehearing—is somewhat less than accurate. Appendix B to the Municipals Supplement is a portion of a January 31, 1989 Michigan Commission Opinion and interim order, and Appendix F is a license change request for a different generating plant filed with the Nuclear Regulatory Commission on February 27, 1989. Indeed, the Michigan Commission Opinon and interim order excerpt submitted as Appendix B already had been submitted in the original recertification proceeding.[23]

The Municipals make no argument in support of submitting the Municipals Notice of Filing except, perhaps, the implicit one that as an addendum to the Municipals Supplement, the Municipals Notice of Filing should receive the same disposition as the Municipal Supplement, for the same reasons.

In the transmittal letter to the Secretary of the Commission accompanying the Joint Supplemental Brief, the Intervenors call the Commission's attention to matters that the Intervenors think should be considered on the requests for rehearing "or, alternatively, on reconsideration. If

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[22] Municipals Supplement at 1 n.1. Rule 212 relates to motions in general, Rule 713 governs rehearings (and includes, in subsection (b), the 30-day limit on filing) and Rule 716 concerns reopening the record.

[23] *See supra* note 12.

permission is required to file this pleading, such permission is respectfully requested in view of the importance of the matters under consideration and the new matter which the Commission should consider." [24] The letter cites no Commission Rule or decision in support of its position, and we note that none of the pleadings filed by the Intervenors on rehearing includes a formal motion for reconsideration.

While the Intervenors denominate their June 6, 1991 submission in part as a "Motion to Lodge," we are not bound by the parties' own characterization of the pleading. We instead examine the substance of the pleading.[25] While a motion to lodge certainly can be a proper pleading under appropriate circumstances, the instant motion does not so qualify. First, a motion to lodge even a *relevant* judicial or administrative decision from a related proceeding is not an occasion for filing additional briefs, and we need not consider the Motion to Lodge insofar as it argues the impact of the opinions and other materials attached to the motion. Second, the Motion to Lodge, notwithstanding its title, clearly constitutes a continuation of the Intervenors' efforts to expand their application for rehearing by filing untimely supplementary pleadings that attack the rationales and conclusions of the recertification orders. To accept the Motion to Lodge merely because of its title "would allow parties to file pleadings and materials not otherwise permitted merely by structuring them as motions to file such pleadings and materials. We will not counte-

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[24] Letter dated February 11, 1991 from counsel for the Municipals to the Secretary of the Commission.

[25] *See Friends of Keeseville, Inc.*, 39 FERC ¶ 61,269 (rejecting filing titled motion for reconsideration, because regardless of title or characterization, motion clearly was untimely request for rehearing), *reh'g denied*, 41 FERC ¶ 61,071 (1987), *aff'd*, 859 F.2d 230 (D.C. Cir. 1988).

nance such transparent attempts to evade our regulations." [26]

Moreover, we would be disinclined to grant the Motion to Lodge in any event. The arguments that it makes and the materials that it attaches are at best merely cumulative to arguments that we already have rejected as irrelevant to the narrow scope of inquiry in a QF certification proceeding.[27]

For similar reasons, we would not accept the Supplemental Filings were we to treat them as motions to reopen the record under Rule 716.[28] To persuade the Commission to exercise its discretion to reopen the record, the requesting party must demonstrate the existence of "extraordinary circumstances." The party must demonstrate a change in circumstances that is more than just material —it must be a change that goes to the very heart of the case. This policy against reopening the record except in extraordinary circumstances is based on the need for finality in the administrative process.[29]

In the instant case, it is clear that the material that the Supplemental Filings seek to introduce would not satisfy

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[26] *Gulf Coast Engineering Management, Inc.*, 51 FERC ¶ 61,314, at p. 62,037 (1990) (rejecting a purported "motion to lodge" because it was in fact an impermissible answer to an answer).

[27] *See infra* text accompanying notes 43-46.

[28] We recognize that the Municipals do suggest that the Municipals Supplement be treated as a motion to reopen the record. Municipals Supplement at 1 n.1. *See supra* notes 20-21 and accompanying text. As explained above, however, we are not bound by the Municipals' characterization of their filing. *See Gulf Coast Engineering Management*, 51 FERC at p. 62,037; *Friends of Keeseville*, 39 FERC at p. 61,880.

[29] *Southern Co. Services, Inc.*, 43 FERC ¶ 61,003, at p. 61,024, *reh'g denied*, 43 FERC ¶ 61,394 (1988), *aff'd mem. sub nom. Gulf States Utilities Co. v. FERC*, 886 F.2d 442 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990). *See Friends of the River v. FERC*, 720 F.2d 93, 98 n.6, 109 (D.C. Cir. 1983).

the above standards for reopening the record. As we discuss in the following section of this order, many of the arguments and materials contained in the Supplemental Filings, to the extent they relate at all to the January 31 order (rather than the March 1 order), are devoted to what is the Intervenors' major assertion on rehearing—that the MCV facility is utility-owned and controlled. The Intervenors attempt on rehearing, as they did in opposition to the recertification request, to show utility ownership and control through a myriad of subarguments about facility contracts, the worth and nature of facility assets, Consumers' role in the development of the project, relations among CMS Energy subsidiaries and a hodge-podge of other alleged facts of similar import. Because we determined that the facts alleged and the arguments raised by the Intervenors do not demonstrate utility ownership and control and in many instances raise issues that are beyond the scope of a QF certification proceeding and are therefore not relevant, we rejected those arguments on the initial recertification.[30] We continue to reject them on rehearing, and we see no reason to accept additional materials on the same arguments. We decline, therefore, to accept any of the Supplemental Filings under the auspices of a motion to reopen the record.

Finally, we likewise find no productive purpose in treating the Supplemental Filings as motions to reconsider. While "[t]he Commission may always entertain motions to reconsider its orders if it so chooses, regardless of whether such motions are properly characterized as requests for rehearing for purposes of appellate review," [31] we see no reason to so choose in the instant matter. Entertaining a motion for reconsideration at the same time

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[30] *See* 50 FERC at pp. 61,279-98.

[31] *Allegheny Generating Co.*, 30 FERC ¶ 61,010, at p. 61,016 (1985) (granting reconsideration of a nonfinal order because such order relied on a Commission decision subsequently remanded by appellate court).

that an application for rehearing of the same order is under review appears to be an unnecessary duplication of effort and simply adds confusion to the rehearing process. We will not allow motions for reconsideration [32] to be used to make otherwise impermissible submissions. Moreover, as we have explained, nothing in the Supplemental Filings raises new issues or relevant new evidence that would lead us to revise our January 31 order.

In sum, we have no authority to accept the Supplemental Filings as late-filed supplements to the Joint Rehearing, as they add to arguments that, by law, must have been made within the 30-day filing deadline for rehearings. We find no reason to accept any of them under any other guise, and we reject, therefore, all of the Supplemental Filings. "There must be an end to litigation, and in any event, these documents either do not show what they purport to show, or are irrelevant to the issues of the proceeding." [33]

IV. Intervenors' Arguments on Rehearing

We will address the Intervenors' arguments on rehearing seriatim, in the same order as presented in the Joint Rehearing. Before we begin that discussion, however, we note that the Intervenors' original arguments against recertification were considered in exhaustive detail in our January 31 order and were found ultimately neither persuasive nor, on the whole, relevant. Faced with those same arguments again on rehearing, we will not repeat here our

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[32] The Intervenors suggest, in their February 11, 1991, transmittal letter, that the Joint Supplemental Brief might be considered as a reconsideration request but offer no support or explanation for their position. *See supra* text accompanying note 24.

[33] *Municipal Electric Utilities Ass'n v. Power Authority of the State of New York*, 48 FERC ¶ 61,124, at p. 61,457, *reh'g denied*, 49 FERC ¶ 61,068 (1989), *aff'd sub nom. Allegheny Electric Cooperative, Inc. v. FERC*, 922 F.2d 73 (2d Cir. 1990), *petitions for cert. filed*, 59 U.S.L.W. 3783 (U.S. May 9, 1991) (Nos. 90-1721, *et al.*).

January 31 order. This is particularly the case given that the Intervenors' filings on rehearing fail to satisfy the mandate of Rule 713 that a request for rehearing state "concisely" the alleged error being challenged.[34] The Intervenors' filings instead set forth at some length and in scattershot fashion arguments that are repetitive, both of the recertification proceeding and of themselves, and that consist primarily of unsupported declamations and speculation.[35] We also emphasize that we include any discussion that follows of material from the impermissible Supplemental Filings solely to demonstrate that the Supplemental Filings, even were there grounds for accepting them, would not have any effect on our decision.

A. *Impact of Recertification*

The Intervenors' first asserted ground for rehearing is that the Commission should consider the impact of its recertification of the MCV facility. The Intervenors begin this argument rather unpersuasively, by misreading a portion of the January 31 order. The Intervenors claim that the Commission "justifies" the recertification "for fear that to rule otherwise 'could realistically affect the capital markets' perception of the risk of this [cogeneration] industry.' Decision, [slip opinion at] pages 78-79. The above quotation appears to be the key to the Commission's decision." [36] First, the factor cited by the Intervenors was mentioned by the Commission not in connection with the general recertification of the facility but in connection with the waiver of the operating and efficiency standards for a limited period. Second, far from being the "key" even to

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[34] 18 C.F.R. § 385.713(c)(1) (1991).

[35] The arguments are "unsupported," either because the Intervenors cite no evidence or legal authority in support of a particular statement or because the cited evidence or legal authority does not accord with the Intervenors' characterization of it.

[36] Joint Rehearing at 10 (quoting 50 FERC at p. 61,305).

the waiver decision, the potentially adverse perception of the capital markets was but a part of one of five factors whose cumulative effect persuaded the Commission to grant the waiver. As we stated, however, "[e]ach of these factors, in isolation, is not dispositive." [37] Moreover, the Intervenors' misreading of the Commission's point here appears disingenuous in view of their more accurate characterization later in the Joint Rehearing when they again cite to pages 78-79 of the slip opinion (dealing with, *inter alia,* the potential perception of the capital markets). On the second reference, however, the Intervenors assert that "[t]he Commission lists at pages 78-79 a number of reasons for granting the waiver, none of which, as the Commission recognizes, are [sic] individually sufficient." [38]

The Intervenors summarize their first argument by asserting that "by ignoring the limitations of PURPA, which prevent utilities from owning or controlling cogeneration facilities and collecting PURPA rates, the Commission discourages new generation, invites severe adverse consequences to the Michigan and national economies, and ignores the Congressional mandate to protect consumers against monopoly power and excessive rates." [39]

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[37] 50 FERC at p. 61,305.

[38] Joint Rehearing at 40.

[39] Joint Rehearing at 9.10 (citing *Gulf States Utilities Co. v. FPC,* 411 U.S. 747 (1973); *Atlantic Refining Co. v. Public Service Commission of New York,* 360 U.S. 278 (1959)). Neither case relates to the Intervenors' assertions regarding new generation or adverse economic consequences or addresses the effect of the later passage of PURPA on our duties under the FPA. The Intervenors' statement in support of their claim of adverse economic consequences are entirely speculative, and we see no reason to address the merits of such statements. *See,* for example, the Joint Rehearing at 15 ("We do not believe that it is an exaggeration to predict that the ultimate consequences of approval of this project, if the precedent is followed with other projects, may rival and greatly exceed the costs of the savings and loan fiasco.").

These assertions invoke the same antitrust-related concerns that the Intervenors raised unsuccessfully on recertification.[40] As we explained in our January 31 order, such issues are outside the limited scope of a QF certification proceeding and therefore provide no grounds for granting rehearing of our recertification decision.[41]

Other arguments of the Intervenors are inappropriate or rest on misunderstandings of our January 31 order. The Intervenors' assertion that we are "deregulating" the MCV facility is both inaccurate and misplaced. Our task in this proceeding is to determine whether or not the facility complies with the ownership and technical standards for a QF. "The fact that qualifying status will relieve the facility of regulation that Consumers Power might otherwise face were [the facility] a part of the utility's rate base is irrelevant. That is a benefit conferred on such facilities by section 210 of PURPA." [42]

In the Supplemental Filings, the Intervenors offer a variation on their argument that Consumers and its parent CMS Energy are using the MCV plant to evade regulation. Their argument, in essence, is that the pro-

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[40] The Intervenors' repeated arguments include: (a) the Michigan Commission's finding that Consumers favored dealing with MCV over other cogenerators, Joint Rehearing at 12; 50 FERC at p. 61,297; (b) the allegedly excessive cost of the facility, including the transfer of Midland nuclear assets at an allegedly above-market price, Joint Rehearing at 12-13; Motion to Lodge at 6-7; 50 FERC at pp. 61,282-83; (c) alleged excess gas profits from contracts favoring MCV, Joint Rehearing at 14; 50 FERC at pp. 61,288, 61,290; (d) transmission line access issues, Joint Rehearing at 16-17; Municipals Supplement at 10; 50 FERC at p. 61,298; and (e) alleged self-dealing of Consumers, Joint Rehearing at 17; 50 FERC at pp. 61,273, 61,292-94.

[41] *See* 50 FERC at pp. 61,297-98. We repeat our concern for allegations of market power and again note that we lack the discretion under PURPA to deny an application for qualifying status on antitrust grounds. *See id.* at p. 61,298.

[42] 50 FERC at p. 61,291.

ceeds of the Midland nuclear plant facilities transferred to the MCV cogeneration facility should be available to Consumers for utility purposes but instead have been diverted to other CMS Energy subsidiaries for the use of the parent company.[43] The Supplemental Filings attach voluminous documenation that purports to support this argument.[44] Whatever validity the Intervenors' arguments may have in respect of a Michigan Commission proceeding, they are unavailing in this proceeding. The regulation allegedly being evaded is regulation by the Michigan Commission under Michigan law [45]—regulation that clearly is outside the Commission's jurisdiction. Moreover, the Michigan Commission Opinions cited by the Intervenors are essentially concerned with actions not by MCV, but by CMS Energy, Consumers and other CMS Energy subsidiaries. The Michigan Commission Opinions thus do not involve parties to this proceeding and do not concern the only issue in this proceeding—the compliance of the MCV facility with the Commission's ownership and technical requirements for QFs.[46]

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[43] *See, e.g.*, Municipals Supplement at 2; Motion to Lodge at 6-11.

[44] *See, e.g.*, Appendix A to Municipals Supplement (May 23, 1990, Michigan Commission Opinion and order); Items A, B, and C to Motion to Lodge (each a May 7, 1991, Michigan Commission Opinion and order).

[45] A particlular concern of the Michigan Commission Opinions is whether Consumers, CMS Energy and certain other CMS Energy subsidiaries have failed to comply with the Michigan Commission stabilization conditions set up in connection with Consumers' financial difficulties arising from the abandoned Midland nuclear facility. *See, e.g.*, Motion to Lodge, Item A at 1-7.

[46] The Michigan Commission Opinions examine, among other things, the disposition within the CMS Energy group of the proceeds of the notes issued in exchange for certain Midland nuclear assets transferred to MCV. Both our January 31 order and March 1 order discuss the notes in detail, concluding that they constitute debt of the partnership, not an equity investment by any CMS Energy company. *See, e.g., CMS Midland, Inc.*, 50 FERC at pp. 61,282-86; *Midland Cogeneration Venture*, 50 FERC at p. 61,803. The use of the proceeds by any noteholder has no bearing on the QF status of the facility.

We find unpersuasive the Intervenors' further allegation that recertification of the MCV plant should be denied because otherwise utilities will be encouraged to convert existing plants to QFs to avoid regulation.[47] First, QF certifications are fact-based and hence must be decided on a case-by-case basis. Any facility seeking QF status must comply with all of the applicable ownership and technical requirements to be granted such status. Second, the Intervenors' argument overlooks the fact that the Midland nuclear assets transferred to MCV never were used in an existing, power-producing facility prior to their transfer.[48]

B. *Ownership and Control of MCV*

The Intervenors' principal ground for rehearing is their assertion that Consumers owns and controls MCV, thereby precluding the facility from satisfying the Commission's regulations concerning utility ownership of QF's.[49] Virtually all of the supporting arguments in the Joint Rehearing, however, replicate arguments asserted by the Intervenors unsuccessfully on recertification.[50] Other

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[47] Joint Rehearing at 14-16, 28-29.

[48] We address a related argument raised by the Intervenors that the MCV facility does not constitute new capacity under our regulations—in section IV.C, *infra*.

[49] *See* Joint Rehearing at 18-29. *See also* Municipals Supplement at 1 ("primary issue in these applications is whether MCV should be considered a plant owned or controlled by Consumers Power (or its affiliates)").

[50] The Intervenors' repeated arguments include: (a) the major contracts for the facility were set up while Consumers owned more than 50 percent of MCV, Joint Rehearing at 18-19; Motion to Lodge at 5-6; 50 FERC at p. 61,274; (b) the notes for the Midland nuclear assets are equity, not debt, because the amount is tied to plant profits, Joint Rehearing at 18, 20, 22; 50 FERC at pp. 61,282-86; (c) Consumers risks more than 50 percent of MCV losses, through the above-cost power purchase contract, Joint Rehearing at 26; 50 FERC at p. 61,274; (d) holders of 51 percent of MCV partnership interests do not control MCV, because basic business decisions

arguments are purely speculative and appear to express no more than the Intervenors' opinions. For example, the Intervenors find it "difficult to imagine" that the majority interest in MCV could exercise any effective control that was "not in accord with" Consumers' interests.[51]

The Intervenors also suggest that the non-utility partners may have entered into side agreements with CMS Midland, Inc., a general partner in MCV (CMS Midland), in which the other partners cede control of MCV. In support of this suggestion, the Intervenors state that "we believe that in at least certain areas, Dow [Chemical Company (Dow)] has agreed to support or not to oppose Consumers Power or MCV actions in relationship to regulatory authorities." [52] Even if this statement is accurate, which we need not decide, it is irrelevant. Dow is not a partner in MCV,[53] and the Intervenors do not suggest that Dow's supporting or not opposing the actions of Consumers or MCV in regulatory matters will affect the allocation of MCV partnership benefits to the disproportionate advantage of CMS Midland (or in any other way).

The Intervenors assert in their Supplemental Filings that recent decisions of the Michigan Commission compel the Commission to rule that Consumers controls MCV.[54] The Intervenors are simply incorrect. First, we

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already have been made, Joint Rehearing at 20; 50 FERC at pp. 61,291-92; (e) the cost of the facility is excessive, Joint Rehearing at 25; Joint Supplemental Brief at 9; Motion to Lodge at 6; 50 FERC at pp. 61,283, 61,286; and (f) non-~~arm's~~ length dealings betwen Consumers and MCV are "determinative" of Consumers' control over MCV, Joint Rehearing at 28; Municipals Supplement at 2; Joint Supplemental Brief at 16; Motion to Lodge at 4; 50 FERC at pp. 61,273, 61,292-94.

[51] Joint Rehearing at 20.

[52] Joint Rehearing at 21. *See also id.* at 9.

[53] Dow's subsidiary, Rofan Energy Inc. (Rofan), is a limited partner in MCV. *See* 50 FERC at p. 61,268 n.6.

[54] *See* Municipals Supplement at 6; Joint Supplemental Brief at 16-20; Motion to Lodge at 1-2.

are not bound in this proceeding by the factual determinations of the Michigan Commission.[55] Moreover, none of the Michigan Commission Opinions cited by the Intervenors addresses, much less decides, whether or not Consumers owns or controls MCV for purposes of the QF ownership requirements under PURPA—the issue now confronting this Commission.[56]

Finally, the Intervenors' reliance upon *University of Tennessee v. Elliott*, 478 U.S. 788 (1986) (*Elliott*), on this point is misplaced. The case on its face applies to federal courts and makes no determinations as to federal administrative proceedings. Moreover, the case addresses an entirely different statutory scheme—the post-Civil War civil rights statutes—that has no bearing on our administration of PURPA and the implementing regulations thereunder.[57] We thus decline to agree with the Intervenors that *Elliott* compels us to accept, for purposes of determining whether Consumers control MCV under our QF ownership regulations, the findings of the Michigan Com-

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[55] *See, e.g., Public Service Co. of New Hampshire*, Docket No. ER91-143-001 *et al.*, slip op. at 9-10 & n.25, 56 FERC ¶ 61,105 (1991) (citing cases); *Nantahala Power & Light Co.*, 20 FERC ¶ 61,430, at pp. 61,869, 61,876 (1982), *aff'd*, 727 F.2d 1342 (4th Cir. 1984).

[56] One Michigan Commission Opinion cited by the Intervenors in fact expressly states that its ruling does not interfere with PURPA. *See* Joint Supplemental Brief, Attachment K at 9-10. In a similar vein, our order here, involving the federal regulatory regime under PURPA, does not profess to interfere in any way with the Michigan Commission' administration of state statutes and regulations. *See Consumers Power Co. et al.*, 52 FERC ¶ 61,023, at p. 61,142 (1990).

[57] The Court in *Elliott* held that a decision in a state administrative employment discrimination proceeding may have a preclusive effect in federal court proceedings under the Reconstruction-era civil rights statutes. *See* 478 U.S. at 796-99. In a portion of the Opinion not discussed by the Intervenors, however, the Court also held that the same state administrative proceedings could not have any preclusive effect in federal court civil rights proceedings under Title VII. *See id.* at 795-96.

mission made in the context of reviewing compliance by Consumers and CMS Energy with state regulation.[58]

In sum, nothing in the Intervenors' request for rehearing persuades us that our January 31 order concluded incorrectly that the MCV facility satisfied the QF ownership criteria during the recertification period. The Intervenors' arguments on this point are either repetitive or inapposite.

C. *Old v. New Capacity*

The Intervenors argue on rehearing—as the Municipals did on recertification [59]—that at least some portion of the MCV facility does not constitute "new capacity" under 18 C.F.R. § 292.304(b).[60] The Intervenors thus claim that recertification of the MCV facility is "illegal." [61]

As the Intervenors' argument here is premised on a misreading of our prior ruling on this issue, the point need not detain us long on rehearing. The Intervenors claim that the Commission erred in granting the MCV facility QF status because, they allege, the facility was constructed before the effective date of PURPA. They see the Commission's error as follows: "[t]he Commission accepts and recognizes that a substantial amount of the MCV project was constructed before November 9, 1978, but grants recertification nonetheless on the grounds that the plant was subsequently modified. Decision, [slip. op. at] pages 73-74." [62] What we in fact said was that

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[58] *See supra* notes 45-46.

[59] *See* 50 FERC at p. 61,303.

[60] The Commission's regulations define "new capacity" as "any purchase from capacity of a qualifying facility, construction of which was commenced on or after November 9, 1978." 18 C.F.R. § 292.304(b) (1991).

[61] Joint Rehearing at 29-30; *see id.* at 14-15.

[62] *Id.* at 29 (citing 50 FERC at p. 61,303).

prior decisions that allowed preexisting facilities to achieve new capacity status upon significant rebuilding all assumed that the old equipment had been used in facilities producing power. Hence, such decisions have no application to MCV, because any equipment in place prior to the post-November 9, 1978 cogeneration conversion never produce electricity prior to the conversion. We treated the facility as a whole new capacity not because of significant rebuilding of an existing, functioning plant, but on the basis of conversion and plant completion activities that rendered the facility capable, for the first time, of producing electricity.[63]

D. *Efficiency Standards*

The Intervenors' fourth argument is that the MCV facility does not satisfy the PURPA efficiency standards.[64] The Joint Rehearing merely disagrees with the Commission's conclusions as to efficiency and refers for support to materials submitted by the Municipals in their recertification filings. We discussed issues as to efficiency at length in our January 31 order.[65] We find nothing within the Joint Rehearing to persuade us to reverse our decision that, based on the facts presented by the parties, the facility would meet our efficiency standards.

We also are not persuaded by the Intervenors' additional arguments on efficiency in the Joint Supplemental Brief, where the Intervenors claim that new evidence supports several of their original positions.[66] First, the Intervenors assert that a report by the engineering firm of Stone & Webster shows that the plant cannot perform at design capacities and therefore cannot perform at the

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[63] 50 FERC at p. 61,303.

[64] Joint Rehearing at 30-31.

[65] 50 FERC at pp. 61,299-303.

[66] Joint Supplemental Brief at 20-24.

levels envisioned in the MCV application.[67] We disagree. The Stone & Webster report cited by the Intervenors is an interim report and expressly states that information regarding compliance with operating and efficiency standards for QF's remains to be supplied.[68] Moreover, the section of the report upon which the Intervenors rely relates to start-up testing, not regular operations. Indeed, the interim report preceded the date of the full, formal integrated performance test.[69]

Second, the Intervenors assert that a January 31, 1991 Consumers internal study of the MCV operational characteristics concludes that supplemental firing is detrimental to the plant heat rate. The Intervenors argue that the Consumers study refutes the Commission's view that supplemental firing can be used to offset gas turbine performance degradation.[70] The study, however, also points out that supplemental firing can be used to increase electricity output,[71] which, of course, was precisely our point in the January 31 order.[72]

Finally, the Intervenors point to a CMS Energy document that allegedly "raise[s] the question as to whether the MCV facility will be able to meet qualifying facility operation and efficiency standards throughout the 1990s."[73] Appendix J to the Joint Supplemental Brief is a CMS Energy Securities and Exchange Commission

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[67] Joint Suplemental Brief at 21-22 (quoting Appendix E at B-47; quoted language actually is at B-17).

[68] Joint Supplemental Brief, Appendix E at B-5.

[69] *Id.* at B-17.

[70] Joint Supplemental Brief at 23 (quoting Appendix L at 3; quoted language actually is at 4). *See* 50 FERC at p. 61,302, for our prior discussion of this point.

[71] Joint Supplemental Brief, Appendix L at 3.

[72] *See* 50 FERC at p. 61,302.

[73] Joint Supplemental Brief at 23 (citing Appendix J at 46-47).

(SEC) Form 10-Q, the quarterly report that most publicly held corporations are required to file and that must contain, according to SEC regulations, disclosure of certain types of potential developments that could, if they come to fruition, materially affect the corporation.[74] The comments of CMS Energy cited by the Intervenors are typical, in our experience, of the cautious nature of disclosure in reports filed with the SEC. In any event, after raising the question of the facility's long-term compliance with PURPA operating and efficiency standards, CMS Energy states its belief that "long-term compliance by the Facility with QF standards can be achieved."[75] CMS Energy's comments as to what conceivably could, but is not expected to, happen several years from now does not persuade us that we were incorrect in finding that, based on the facts presented to us, the MCV facility complies with all applicable QF operating and efficiency standards. The Intervenors' other arguments on rehearing as to efficiency likewise do not compel changes to our January 31 order.

E. *Hearing*

The Intervenors assert that a hearing is required to resolve substantial factual questions.[76] The purported factual questions identified by the Intervenors, however, are neither new nor relevant. Rather, they involve issues that we have considered and rejected, both in our January 31 order and elsewhere in this order.[77] For example, the Intervenors allege that

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[74] We take official notice of the existence of SEC rules governing the contents of a Form 10-Q, but we see no necessity or utility in discussing further the particulars of such rules.

[75] Joint Supplemental Brief, Appendix J at 46.

[76] Joint Rehearing at 31-36.

[77] The subjects of the alleged factual questions include: (a) whether Consumers owns and controls MCV; *see* section IV.B, *supra*; (b) whether the MCV partners have entered into side contracts ceding control to CMS Midland; *see supra* text accompanying

> a hearing is necessary to explore indications that Consumers Power has sought to lobby MCV through the regulatory process. For example, CMS Chairman William McCormick referred to "some preliminary discussions with the staffs of [FERC and NRC] . . . and [stated] we are optimistic that we will get approval." Presentation to the New York Society of Securities Analysts, Attachment A, pages 5, 7.[78]

The quoted remarks of Mr. McCormick in fact have nothing to do with the MCV project; he referred instead to the Palisades nuclear plant, which is not at issue in this proceeding.[79] In view of our disposition of the purported factual questions raised by the Intervenors, we conclude that a hearing would not cause us to change any aspect of our January 31 order.

F. *Initial Certification*

The Intervenors offer as a further ground for rehearing the assertion that the initial certification of the MCV facility does not justify recertification.[80] We need not discuss on rehearing the Intervenors' supporting arguments—which raise no new issues [81]—because the general

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notes 55-56; (c) whether the facility satisfies the applicable QF efficiency standards, *see* section IV.D, *supra*; and (d) the alleged anticompetitive impact of the facility; *see supra* text accompanying notes 42-44.

[78] Joint Rehearing at 32 n.14 (brackets in text included in original).

[79] Joint Rehearing, attachment A at 7. Moreover, the Municipals made virtually the identical allegation during an earlier stage of this recertification proceeding. *See* Michigan Municipal/Cooperative Group Answer to MCV's Motion for Expedited Treatment at 7 & n.9, dated January 12, 1990.

[80] Joint Rehearing at 36-38.

[81] The Intervenors repeat, for example, their arguments that the original certification never took effect because the ownership and technical configuration of the facility changed prior to initial operation of the plant. *See* 50 FERC at pp. 61,273-74.

point reflects a misapprehension of the basis of the January 31 order. We did not recertify the MCV facility simply because we initially certified it in 1987. Instead, we granted recertification because, on the basis of the facts presented on recertification, and after giving effect to our limited waiver of the operating and efficiency standards, the facility satisfied the applicable statutory and regulatory QF requirements at the time that it first produced electricity. As we explained in the January 31 order, whether the facility satisfied those requirements before producing electricity is irrelevant to our limited inquiry.[82]

G. *Appropriateness of Waiver*

The Intervenors argue that the Commission's waiver of the applicable operating and efficiency standards for the calendar year 1989 was inappropriate.[83] Their arguments in support of this point consist essentially of expressions of disagreement with the factors that in the aggregate persuaded us to grant the waiver.[84] The Intervenors' arguments on rehearing certainly demonstrate their disagreement with our conclusions but fail to introduce any evidence or arguments that persuade us that granting the waiver was a mistake. We decline, therefore, to grant rehearing on this issue.

H. *Utility Status of MCV*

As their final substantive argument in support of rehearing, the Intervenors allege that MCV may be a utility because it may, in their view, make retail sales.[85] The Intervenors' statements to the contrary notwithstanding,

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[82] *See* 50 FERC at pp. 61,277-78.

[83] Joint Rehearing at 38-42.

[84] *See* 50 FERC at pp. 61,305-06 (discussing factor in support of the waiver).

[85] Joint Rehearing at 42-46.

the issues and alleged facts in the Joint Rehearing on this point were thoroughly considered and rejected in the January 31 order.[86] We will not repeat the discussions here.

The Intervenors do cite (but do not submit) a 1989 trade newsletter statement about energy-related activities of Dow's subsidiary Destec Energy, Inc. (Destec). The Intervenors argue from it that Dow should be required to show that all of Destec's projects are qualifying facilities and that Dow is not otherwise a utility.[87] The Intervenors' argument is speculative and lacking in both specifics and persuasive evidence. It is, therefore, insufficient to support the Intervenors' argument for rehearing as to the alleged possibility that MCV may be a utility.

Even if the allegations as to the Dow subsidiary were true, they would not constitute grounds for rehearing. As we pointed out in the January 31 order, in the event any non-CMS Midland partner is found to be an electric utility or electric utility holding company, its interest in MCV will be reduced to zero.[88] We find, in sum, nothing in the Intervenors' filings that impels rehearing on the basis of an alleged utility status of MCV.

V. Motion for Stay

The Municipals Motion For Stay requests the following relief:

> 1. A stay of the effectiveness of the January 31 order and the March 1 order pending issuance of final, nonreviewable orders.
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> 2. That MCV and Consumers be ordered to take all steps to prevent distribution of the proceeds of the notes attributable to or associated with the sale

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[86] *See* 50 FERC at pp. 61,294-97.

[87] Joint Rehearing at 8.

[88] 50 FERC at p. 61,297.

of Midland nuclear assets to MCV without the Commission's prior approval.

3. That the Commission grant such other relief as may be found to be appropriate.

4. That the Commission hear oral argument on the "substantial legal and factual questions of national importance." [89]

For the reasons discussed below, we shall deny the Motion for Stay in its entirety.

Pursuant to the Administrative Procedure Act, the Commission may stay its actions "when justice so requires." [90] We follow, however, a general policy of denying motions for stays, based on the need for definitiveness and finality in administrative proceedings.[91] In deciding whether a stay would be appropriate in a particular case, we generally consider several factors: (1) whether the moving party will suffer irreparable injury without a stay; (2) whether issuing the stay will not substantially harm the other parties; and (3) whether a stay is in the public interest.[92] The key element in our inquiry is irreparable injury to the moving party.[93] If such party is unable to demonstrate that it will suffer irreparable harm if we do not grant a stay, we need not examine the other factors.[94]

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[89] Motion for Stay at 7, 9.

[90] 5 U.S.C. § 705 (1988). *See, e.g., Northwest Pipeline Corp.*, 48 FERC ¶ 61,016 at p. 61,105 (1989).

[91] *Northwest Pipeline Corp.*, 48 FERC at p. 61,105; *Distrigas of Massachusetts Corp.*, 24 FERC ¶ 61,250, at p. 61,528 (1983); *Arkansas Louisiana Gas Co.*, 23 FERC ¶ 61,324, at p. 61,714 (1983).

[92] *Eugene Water & Electric Board*, 50 FERC ¶ 61,033, at p. 61,054 (1990).

[93] *Columbia Gas Transmission Corp.*, 47 FERC ¶ 61,324, at p. 62,137 (1989); *Arkansas Louisiana Gas Co.*, 23 FERC at p. 61,714.

[94] *Public Service Co. of Indiana*, 3 FERC ¶ 61,110, at p. 61,307 (1978). *See Wisconsin Gas Co. v. FERC*, 758 F.2d 609, 674 (D.C. Cir. 1985) (per curiam).

In this instance, the Municipals do not demonstrate that they will suffer irreparable harm absent a stay. They identify as allegedly potential harms that: (1) recertification will allow MCV to sell cogenerated electricity at avoided cost rates pursuant to PURPA: (2) Michigan will become "a high cost energy state;" [95] and (3) Consumers' corporate parent will be able to obtain and dispose of the proceeds of the sale of Midland nuclear plant assets for $1.5 billion. We find that the adverse consequences predicted by the Municipals—the possibility of higher prices and unavailable funds—are of a purely economic nature.[96] It is well-settled that the potential for

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[95] Motion to Stay at 4.

[96] The Municipals do not explain how, specifically, they would be harmed by the events that they predict. In general, bare allegations and speculative predictions of harm are insufficient to support a stay. *Massachuetts Municipal Wholesale Electric Co. v. Power Authority of the State of New York*, 31 FERC ¶ 61,215, at p. 61,429 (1985) (citing *Wisconsin Gas v. FERC*, 758 F.2d at 674).

With respect to the Municipals' concern for the unavailability of the proceeds from the asset transfer, we note that the Court of Appeals of Michigan recently affirmed an order of the Michigan Commission, dated May 23, 1990, directing CMS Energy to return to Consumers certain proceeds of the sale of the Midland nuclear assets. *CMS Energy Corp. v. Attorney General*, No. 129241 (Mich. Ct. App. July 9, 1991) (per curiam) (LEXIS, States library, Mich. file). We emphasize, however, that our disposition of the Motion to Stay is in no way dependent upon the Michigan Commission order, the Court of Appeals affirmance or the outcome of any further appeals.

We further note that the facts related in the decision of the Court of Appeals of Michigan suggest—as do some of the attachments to the Supplemental Filings—that some of the facts concerning the corporate structure of CMS Energy and its subsidiaries recited in MCV's November 14, 1989 application for recertification (to reflect the sale/leaseback) may not reflect current arrangements. However, as we stated earlier in this order, a QF certification order is based strictly on the facts presented. *See supra* text accompanying note 10. If those facts change, the Commission's order cannot be relied upon, in view of different factual circumstances. A change of facts, however, will not necessarily affect the particular facility's continuing status as a QF. That question

such economic loss does not and cannot constitute irreparable harm for purposes of justifying a stay.[97] Absent an adequate showing of irreparable harm, the Municipals cannot satisfy our conditions for a stay.

Moreover, we do not perceive any reason to grant the Municipals' request for oral argument. As we explained above in denying the request for a hearing, the Intervenors do not identify any new issues that are material to the limited scope of our inquiry in this recertification proceeding. In particular, the Intervenors fail to craft such issues—or to come up with grounds for rehearing or stay—merely by speculating, without any support, that Consumers "may" have had improper communications with this Commission regarding the MCV project.[98]

The Commission orders:

(A) The Intervenors' Joint Rehearing of the January 31 order is hereby denied.

(B) The Municipals' Supplement is hereby rejected.

(C) The Municipals' Notice of Filing is hereby rejected.

(D) The Intervenors' Joint Supplemental Brief is hereby rejected.

(E) The Intervenors' Motion to Lodge is hereby rejected.

(F) The Municipals' Motion for Stay is hereby denied.

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turns on whether the facility satisfies, under the different factual circumstances, our technical and ownership requiremnts for a QF. *See Inter-Power of New York, Inc.*, 55 FERC ¶ 61,387, at p. 62,179 (1991).

[97] *Massachusetts Municipal Wholesale Electric Co.*, 31 FERC at p. 61,429 (citing *Wisconsin Gas v. FERC*, 758 F.2d at 674). The court in *Wisconsin Gas v. FERC* did note, however, that monetary loss could constitute irreparable harm if it threatened the very existence of a movant's business. 758 F.2d at 674. No evidence suggests that this narrow exception has any application in this case.

[98] *See* Motion for Stay at 7-9. *See also supra* section IV.E.

APPENDIX G

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. QF87-237-004, QF87-237-000,
and QF87-237-002

MIDLAND COGENERATION VENTURE LIMITED
PARTNERSHIP AND CMS MIDLAND, INC.

ORDER DENYING REQUESTS FOR REHEARING
AND REJECTING SUPPLEMENTAL FILINGS

(Issued September 11, 1991)

Before Commissioners: Martin L. Allday, Chairman; Charles A. Trabandt, Elizabeth Anne Moler, Jerry L. Langdon and Branko Terzic.

Background

On April 2, 1990, the State of Michigan, acting through its Attorney General (Michigan), and the Michigan Municipal Cooperative Group (the Municipals [1] and, collectively with Michigan, the Intervenors) each filed a

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[1] The Municipals have stated that for purposes of this proceeding, the group consists of virtually all of the publicly owned municipal and cooperative electric systems in Michigan's lower peninsula. *See Midland Cogeneration Venture, L.P. et al.*, 50 FERC ¶ 61,259, at pp. 61,792-93 nn.3-4 (1990) (listing the participating systems).

separate request for rehearing (repectively, the Michigan Rehearing and the Municipals Rehearing) of the Commission's March 1, 1990 order in Docket Nos. QF87-237-002, QF87-237-001 and QF87-237-000 (the March 1, 1990 Order).[2] In that order, the Commission granted the application of Midland Cogeneration Venture Limited Partnership (MCV) for recertification of a topping-cycle cogeneration facility located in Midland, Michigan as a qualifying cogeneration facility (QF) under section 3(18)(B) of the Federal Power Act (FPA), as amended by section 201 of the Public Utility Regulatory Policies Act of 1978 (PURPA), and the Commission's implementing regulations. The recertification in the March 1, 1990 Order reflects a change in the facility's ownership resulting from a sale/leaseback of the facility as part of its long-term financing.[3]

The Michigan Rehearing requests rehearing for the reasons set forth in Michigan's prior filings in Commission proceedings concerning the certification or recertification of the Midland facility as a QF. The Municipals Rehearing makes three arguments: (1) MCV does not satisfy the Commission's QF ownership requirements because an electric utility, Consumers Power Company

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[2] 50 FERC ¶ 61,259 (1990).

[3] The Commission initially certified the Midland facility as a QF in 1987. *See CMS Midland, Inc.*, 38 FERC ¶ 61,244 (1987). On January 31, 1990, the Commission issued an order recertifying the facility (the January 31, 1990 order) to reflect changes relating to the MCV partnership and the technical configuration of the plant. In an order issued July 31, 1991 (the July 31, 1991 order), the Commission denied the Intervenors' joint request for rehearing of the January 31, 1990 order. *See CMS Midland, Inc. et al.*, 50 FERC ¶ 61,098 (1990), *reh'g denied*, 56 FERC ¶ 61,177 (1991), *appeal docketed sub nom. Michigan Municipal Cooperative Group v. FERC*, No. 91-1366 (D.C. Cir. Aug. 5, 1991). In the July 31, 1991 order, the Commission also denied the Municipals' motion, filed on March 15, 1990, to stay the effectiveness of both the January 31, 1990 order and the March 1, 1990 order. *See CMS Midland, Inc.*, 56 FERC at pp. 61,600-31.

(Consumers), allegedly owns more than fifty percent of and controls the project; (2) the Commission in this proceeding should examine allegedly anticompetitive circumstances surrounding, and other effects of, recertification of the facility; and (3) the instant proceeding and the earlier recertification proceeding should have been consolidated.

The Commission issued an order on May 2, 1990 granting rehearing for the limited purpose of further consideration.

On June 1, 1990, the Municipals filed a document entitled "Supplement to Applications for Rehearing" (Municipals Supplement).[4] MCV filed an answer in opposition to the Municipals Supplement on June 18, 1990. On July 13, 1990, the Municipals submitted a related supplemental filing entitled "Notice of Filing" (Municipals Notice of Filing), attaching documents that the Municipals identify as an additional appendix to the Municipals Supplement. On July 27, 1990, MCV filed an answer in opposition to the Municipals Notice of Filing.

On July 30, 1990, counsel for the Municipals submitted a letter requesting expeditious treatment of the rehearing applications.

On February 11, 1991, the Intervenors jointly filed a document entitled "Supplemental Brief in Support of the State of Michigan's and the Michigan Municipal Cooperative Group's Applications for Rehearing and Motion for a Decision" (Joint Supplemental Brief). MCV filed an

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[4] This document, and each subsequent supplemental filing by either or both of the Intervenors, is directed to the Intervenors' joint request for rehearing of the January 31, 1990 order as well as to their respective requests for rehearing of the March 1, 1990 order. Each of the supplemental filings (except a motion to lodge filed July 30, 1991 and discussed *infra*) and each of MCV's responses is discussed in greater detail in the July 31, 1991 order. *See* 56 FERC at p. 61,621.

answer in opposition to the Joint Supplemental Brief on February 26, 1991.

On June 6, 1991, Michigan and the Municipals jointly submitted a document styled "Renewed Motion for Commission Decision on Applications for Rehearing and Motion to Lodge Decisions and Other Relevant Material" (Joint Motion to Lodge). MCV filed an answer in opposition to the Joint Motion to Lodge on June 21, 1991.[5]

On July 30, 1991, the Municipals filed an additional supplemental document entitled "Motion to Lodge Recent Decisions [sic] Containing Supplemental Authority" (Municipals Motion to Lodge and, collectively with the Municipals Supplement, the Municipals Notice of Filing, the Joint Supplemental Brief and the Joint Motion to Lodge, the Supplemental Filings). The Municipals Motion to Lodge argues the relevance of a recent decision of the Court of Appeals of the State of Michigan.[6]

Discussion

I. Decision Summary

We will deny the Michigan Rehearing and the Municipals Rehearing of our recertification order of March 1, 1990 in their entirety. We will again reject Michigan's and the Municipals' untimely efforts to supplement their requests for rehearing. We will dismiss as moot the various requests in the Supplemental Filings for a decision on the requests for rehearing. Additionally, we will reject the various requests in the rehearings and the Supplemental Filings for an evidentiary hearing and oral argument. In view of our disposition of the issues raised

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[5] MCV does not oppose the Joint Motion to Lodge to the extent that it moves for a decision on the Intervenors' requests for rehearing.

[6] *See CMS Energy Corp. v. Attorney General*, No. 129241 (Mich. Ct. App. July 9, 1991) (per curiam) (LEXIS, States library, Mich file); *see also infra* notes 8 & 11 (discussing decision and Municipals Motion to Lodge).

by the Intervenors, we do not believe that further argument is necessary.

II. Preliminary Matters

Before discussing the merits of the Michigan Rehearing and the Municipals Rehearing, we address several preliminary matters. First, the requests for rehearing in the main raise the same issues and make the same arguments as those addressed extensively in our March 1, 1990 order. Indeed, in many instances the issues and arguments are the same as those addressed in our January 31, 1990 Order and July 31, 1991 order, as well.[7] We are not inclined unnecessarily to repeat in this order our prior discussions; we thus limit the scope of this order accordingly.

Second, we confirm our rejection, as set forth in the July 31, 1991 order, of the Supplemental Filings as untimely additions to timely-filed requests for rehearing.[8]

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[7] The respective recertifications of the Midland facility in the January 31, 1990 order (dealing with changes in the ownership and technical configuration of the Midland facility), as affirmed by the July 31, 1991 order, and in the March 1, 1990 order (dealing with further changes in ownership stemming from the sale/leaseback of the Midland facility), as affirmed by the instant order, are conceptually and factually distinct. This distinction led us to consider the separate requests for recertification in separate orders and to deny motions to consolidate the proceedings. Nevertheless, the Intervenors have offered many of the same arguments in opposition to both recertifications. Indeed, all of the Supplemental Filings are directed toward the Intervenors' joint request for rehearing of the January 31, 1990 order, as well as to one or both of the requests for rehearing of the March 1, 1990 order. Moreover, the Intervenors generally do not specify which proffered supplemental materials are intended to support which rehearing request.

[8] The July 1, 1991 order expressly rejected the Municipal Supplement, the Municipals Notice of Filing, the Joint Supplemental Brief and the Joint Motion to Lodge. *See* 56 FERC at pp. 61,623-25, 61,631. We did not receive the Municipals Motion to Lodge, filed on the afternoon of July 30, 1991, in sufficient time to ex-

As we explained, we have no authority under the FPA to accept supplemental pleadings submitted after the expiration of the 30-day period during which rehearings must be filed. We nonetheless examined the Supplemental Filings to determine whether they should be accepted as, *e.g.*, motions to reopen the record or motions to reconsider.[9] In our July 31, 1991 order, we discussed portions of the Supplemental Filings that pertained to the January 31, 1990 order. In the instant order, we will discuss, to the extent we deem necessary or appropriate, remaining substantive portions of the Supplemental Filings that argue for rehearing of the March 1, 1990 order.[10] The result in each case is the same: we find no alternative basis for accepting the Supplemental Filings, because none of the arguments and materials contained in any of them warrants a change in any aspect of our earlier recertification orders.[11]

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pressly address it in the July 31, 1991 order. We did, however, discuss the Michigan Court of Appeals decision that the Municipals seek to lodge. *See* 56 FERC at p. 61,631 n.96. In the instant order, we expressly reject the Municipals Motion to Lodge. *See infra* note 11.

[9] *See* 56 FERC at pp. 61,623-25. We recognize that the Intervenors style two of the Supplemental Filings (the Joint Motion to Lodge and the Municipals Motion to Lodge) as motions to lodge. As we pointed out in our July 31, 1991 order, however, we are not bound by parties' characterizations of their own pleadings. *See* 56 FERC at p. 61,624.

[10] We emphasize, however, that any discussion in this order of the substance of any of the Supplemental Filings is included solely to demonstrate that nothing in the Supplemental Filings would cause us to change the March 1, 1990 order even if we were empowered to accept them.

[11] *See* 56 FERC at pp. 61,623-25. For the same reasons that we have rejected the other Supplemental Filings, we also reject the Municipals Motion to Lodge. The arguments made in the Municipals Motion to Lodge would in any event be unavailing. The Municipals attempt to bolster their arguments about utility ownership

Next, we restate certain principles regarding the nature, effect and scope of a QF certification proceeding that have guided our consideration of the Michigan Rehearing and the Municipals Rehearing. One, a QF certification order is in essence a declaratory order, based strictly on the facts presented. Two, if those facts change, the certification order cannot be relied upon, owing to different factual conditions not considered by the Commission. Such a change in facts, however, will not necessarily deprive a facility of QF status—that issue turns upon whether or not the facility, under the new facts, continues to comply with the statutory and regulatory requirements for a QF. Three, the scope of a QF certification proceeding is narrow—it is limited to a determination whether, on the facts presented, the facility at issue will comply with the Commission's ownership and technical requirements.[12]

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and control of MCV, *see infra* text accompanying notes 38-62, by submitting a Michigan Court of Appeals decision affirming an Order of the Michigan Public Service Commission (the Michigan Commission). *See supra* notes 6 & 8. As we explained in our July 31, 1991 order, however, we are not bound by the factual determinations of the Michigan Commission. *See* 56 FERC at pp. 61,627-28. Moreover, the Michigan Commission Order upheld by the Michigan Court of Appeals decision dealt with issues governed by Michigan law, not with the issue now before this Commission—that is, whether or not the MCV facility complies under federal law with the ownership requirements for QF status. *See id.* at pp. 61,626-28, 61,631 n.96. The conclusions, therefore, of the Michigan Commission and the Michigan Court of Appeals about certain actions in connection with MCV by Consumers, its parent holding company (CMS Energy Corporation (CMS Energy)) and their affiliates neither compel nor persuade us to revise our conclusions in the March 1, 1990 order (or in the January 31, 1990 order) about ownership of the MCV facility for purposes of QF status.

[12] *See* March 1, 1990 order, 50 FERC at 61,801. *See also* July 31, 1991 order, 56 FERC at pp. 61,622, 61,631 n.96; January 31, 1990 order, 50 FERC at pp. 61,277-78. *Accord, e.g., Inter-Power of New York, Inc.*, 55 FERC ¶ 61,387, at p. 62,179 (1991); *US West Financial Services, Inc.*, 55 FERC ¶ 61,377, at p. 62,146, *order on reh'g*, 56 FERC ¶ 61,217 (1991); *Georgetown Cogeneration, L.P.*, 54

We reiterate these points, and take this opportunity to clarify any remaining ambiguity, because the Intervenors continue to present arguments, either explicit or implicit, concerning matters outside the narrow scope of this recertification proceeding.[13] The only issue properly before us is whether MCV satisfies the ownership re-

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FERC ¶ 61,049, at pp. 61,184-85, *reh'g denied*, 55 FERC ¶ 61,038 (1991).

The critical date for determining QF status for a facility not already producing electric energy is the date that it first commences production of electric energy. The critical date for a facility already producing electric energy is the time the events described in the certification application (here, the sale/leaseback) take place. *Georgetown Cogeneration*, 54 FERC at p. 61,185; January 31, 1990 order, 50 FERC at pp. 61,277-78.

[13] *See, e.g.*, Municipals Rehearing at 28-30 (charging the Commission with ignoring the alleged anticompetitive effect of recertification). The Intervenors attempt to update their arguments by offering numerous additional materials, particularly in the Supplementary Filings. Yet some of the purportedly new evidence is in fact not new. Appendix B to the Municipals Supplement, for example, is an excerpt from a January 31, 1989 Michigan Commission Opinion and Interim Order. The same excerpt is included as Appendix B to Michigan's January 2, 1990 intervention in this proceeding. The Municipals do not advise the Commission in the Municipals Supplement that the excerpt has been considered previously (and rejected) in this proceeding. Item G, attached to the Joint Motion to Lodge, consists of excerpts from testimony given before the Michigan Commission on June 23-24, 1988. The Intervenors offer no explanation why they waited until June 6, 1991 to attempt to submit those materials in this proceeding.

Moreover, other of the materials offered by the Intervenors would not be credible evidence even if such materials were relevant. For example, Item E, attached to the Joint Motion to Lodge, is an excerpt from a brief filed in a Michigan court proceding by the Intervenors themselves. Item H to the Joint Motion to Lodge purports to include excerpts from testimony by the president of Consumers and chairman of CMS Energy in a Commission proceding involving the Palisades nuclear generating plant. That portion of Item H in fact consists almost entirely of colloquy between the presiding adminstrative law judge and counsel for the Municipals.

quirements of PURPA and our implementing regulations after consummating the sale/leaseback transaction, as described in the sale/leaseback application for recertification. We have stated in our earlier orders concerning recertification of the Midland facility that we have no authority to consider other issues, such as the alleged anticompetitive effects or ratepayer impact of certification of the Midland facility.[14] We do not seek to minimize the importance of such issues; we state only that allegations that are unrelated to the limited definitional criteria for QF status are more appropriately considered in other proceedings (federal, state or local).[15]

The above principles follow logically from the statutory and regulatory framework that governs QF status. The regulations setting forth the general requirements for qualification of a cogeneration facility provide that "[a] cogeneration facility, including any diesel and dual-fuel cogeneration facility, *is* a qualifying facility if it: (1) Meets any applicable operating and efficiency standards specified in § 292.205(a) and (b); and (2) Meets the ownership criteria specified in § 292.206."[16] The regulations similarly provide, under the section that details procedures for obtaining qualifying status, that "[a] small power production facility or cogeneration facility which meets the criteria for qualification set forth in § 292.203 *is* a qualifying facility."[17] Section 292.207 requires that

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[14] *See* July 31, 1991 order, 56 FERC at pp. 61,622-23, 61,626; March 1, 1990 order, 50 FERC at pp. 61,805, 61,807; January 31, 1990 order, 50 FERC at pp. 61,278, 61,290, 61,298.

[15] *See, e.g., Inter-Power of New York,* 55 FERC at p. 62,179 (QF certification proceeding not the proper place to address environmental concerns and alleged adverse ratepayer impact).

[16] 18 C.F.R. § 292.203(b) (1991) (emphasis added). Section 292.203 similarly provides that a small power production facility "is" a qualifying facility if it meets the specified criteria. 18 C.F.R. § 292.203(a) (1991).

[17] 18 C.F.R. § 292.207(a)(1) (1991) (Emphasis added.)

the owner or operator of a QF provide written notice to the Commission containing basic information about the facility and its operations.[18] The regulations thus contemplate self-certification—that a facility achieves QF status without any direct action by the Commission.

The regulations do not impose any additional obligation—other than the filing of a more detailed application —on the owner or operator of a facility that elects the "[o]ptional procedure" of filing an application for Commission certification of QF status.[19] To the contrary, the regulations (and their preamble) clearly demonstrate that the only substantive requirements that the owner or operator of a facility seeking Commission certification must satisfy are the same ownership and technical requirements as those applicable to self-certification.[20] In granting an application for QF certification (or recertification), therefore, the Commission in essence merely confirms to the

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[18] 18 C.F.R. § 292.207(a)(2) (1991). The notice need not include the percentage of ownership by any electric utility or electric utility affiliate.

[19] *See* 18 C.F.R. § 292.207(b) (1991).

[20] As initially proposed, the QF regulations would have required that every person seeking QF status for a facility file an application with the Commission. As a result of comments received in the rulemaking proceeding, the preamble to the final regulations explained,

> the requirement for case-by-case qualification has been eliminated. Section 292.207(a) of this rule provides that any small power production or cogeneration facility which meets the requirements for qualification set forth in that section is a qualifying facility.
>
> However, the Commission has provided an optional procedure in § 292.207(b) of this rule whereby an application for Commission certification of qualifying status may be filed at the discretion of the owner or operator of the facility.

45 Fed. Reg. 17,959, 17,962-63 (1980), *reprinted in* [*FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,134, at p. 30,938.

applicant, at the applicant's request, what that party could have confirmed to the Commission—that the facility at issue satisfies the ownership and technical requirements for a QF and therefore is a QF.[21] This treatment of QF applications is consistent with Congress' mandate to the Commission in PURPA to encourage the development of cogeneration and small power production.[22]

Fourth, the Intervenors incorporate by reference their arguments in their various filings both in this recertification proceeding and in the recertification addressed in our January 31, 1990 order.[23] Indeed, the Michigan Rehearing consists of little more than statements incorporating by reference all of Michigan's previous arguments in all QF certification proceedings involving the Midland facility.[24] We see no need to repeat here our analysis of those arguments, given our detailed discussions of the Intervenors' arguments in our earlier orders. We summarily deny the Michigan Rehearing and the Municipals Rehearing, therefore, to the extent that they incorporate

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[21] *See* H.R. Conf. Rep. No. 95-1750, Public Utility Regulatory Policies Act, 95th Cong., 2d Sess. 89 (1978) (Congress intended that the Commission establish its QF requirements in such a way that a party "may ascertain in advance of construction or operation of any facility whether or not such facility will meet the criteria contained in these definitions").

[22] For a brief discussion of Congress' intent, in passing PURPA, to encourage the development of cogeneration and small power production facilities, *see FERC v. Mississippi*, 456 U.S. 742, 750-51 (1982) (upholding constitutionality of Commission's QF regulations). *See also Turners Falls Limited Partnership*, 55 FERC ¶ 61,487, at pp. 62,669-70 & n.33 (1991) (discussing relevant legislative history of PURPA).

[23] *See* Michigan Rehearing at 1, 3; Municipals Rehearing at 11, 32. As we noted previously, all of the Supplemental Filings are directed to the Intervenors' requests for rehearing of both the January 31, 1990 order and the March 1, 1990 order. *See supra* notes 3 & 7.

[24] *See* Michigan Rehearing at 1, 2, 3.

by reference arguments previously raised by the Intervenors.

Additionally, the Intervenors renew their assertion that this recertification proceeding should have been consolidated with the other recertification proceeding in Docket No. QF87-237-001.[25] We considered and rejected the Intervenors' requests for consolidation in our earlier orders,[26] and the Intervenors make no new arguments in favor of consolidation in this rehearing. We summarily deny the Michigan Rehearing and the Municipals Rehearing, therefore, on the issue of consolidation. Finally, all other arguments of the Intervenors not specifically addressed below shall be deemed denied as duplicative or irrelevant, or both.

III. The Michigan Rehearing

The Michigan Rehearing is based almost entirely upon Michigan's previous arguments, incorporated by reference, in this recertification proceeding and in earlier Midland proceedings. To that extent, we already have summarily rejected the Michigan Rehearing.[27] The Michigan Rehearing does expressly argue that the Commission had insufficient facts before it to conclude that the facility would continue to satisfy the Commission's QF ownership regulations after the sale/leaseback,[28] but this argument is not

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[25] Michigan Rehearing at 3; Municipals Rehearing at 30-31. Michigan also renews its motion for the consolidation of both recertification dockets with Docket No. QF87-237-000, the original certification of the Midland facility. For the reasons stated above, we summarily reject Michigan's renewed request.

[26] *See* March 1, 1990 order, 50 FERC at p. 61,801; January 31, 1990 order, 50 FERC at pp. 61,278-79.

[27] *See supra* text accompanying notes 23-24.

[28] Michigan Rehearing at 1-2. Michigan also offers its opinion that the Commission did not have sufficient facts to determine that the Midland facility satisfies our QF operating and efficiency standards. *Id.* at 2. This assertion is somewhat puzzling in the context

new. We fully considered it and rejected it in the March 1, 1990 order,[29] and the Michigan Rehearing adds nothing in support to its bare statement of the issue.

Michigan also claims that "changes have occurred since the date of the application." Specifically, Michigan states that "Drexel Burnham," which Michigan identifies as the broker involved in arranging the sale/leaseback financing "and a possible participation," [30] is no longer involved. Michigan speculates that this development may have precipitated other, unknown changes.[31]

Michigan's speculations do not persuade us to grant the Michigan Rehearing. At the time that we granted recertification in connection with the sale/leaseback, negotiations to complete the transaction were not complete. MCV acknowledged, and the Commission accepted, that the ongoing financing process might produce changes from the description of the transaction presented to the Commission. MCV represented, however, that the final details

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of the Michigan Rehearing, as the sale/leaseback at issue in this proceeding would have no effect on the facility's technical configuration and performance. In any event, the mere assertion would not cause us to grant rehearing, particularly as we addressed the issue of compliance with operating and efficiency standards in detail in both the January 31, 1990 order and the July 31, 1991 order. *See* July 31, 1991 order, 56 FERC at pp. 61,628-29; January 31, 1990 order, 50 FERC at pp. 61,298-303.

[29] March 1, 1990 order, 50 FERC at pp. 61,805-06.

[30] Michigan Rehearing at 2. Attachment 2 to MCV's application for recertification, a summary of the sale/leaseback terms and conditions (the Term Sheet), states that Drexel Burnham Lambert Incorporated (Drexel) would arrange a portion of the long-term debt to be issued by MCV. Term Sheet at 2. It is not clear whether Drexel intended to be a loan participant itself, but the question is not relevant to this rehearing, as holders of debt issued by a QF are not regarded as equity holders for purposes of QF ownership regulations. *See, e.g., Ultrapower 3*, 27 FERC ¶ 61,094 (1984).

[31] Michigan Rehearing at 2.

would not change the crucial fact—that after the sale/leaseback, the facility would remain in compliance with the Commission's QF ownership regulations, in that electric utility participation would not exceed fifty percent.[32] If that representation was incorrect, the parties no longer may rely on the recertification order.[33] In the meantime, however, the Michigan Rehearing does not persuade us that our March 1, 1990 Order was incorrect in any regard.

IV. The Municipals Rehearing

The Municipals Rehearing raises three issues in support of rehearing our March 1, 1990 order. Only the first argument that MCV does not comply with the Commission's QF ownership requirements—warrants further discussion.[34] Before beginning that discussion, we point out, as

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[32] *See* March 1, 1990 order, 50 FERC at pp. 61,805-06.

[33] *See supra* text accompanying note 12. Some of the exhibits to the Supplemental Filings also suggest that changes may have occurred since MCV's application for recertification to reflect the sale/leaseback. It appears, for example, from the Michigan Court of Appeals decision attached to the Municipals Motion to Lodge, *see supra* notes 6 & 11, that *CMS Midland, Inc.* (CMS Midland), the utility general partner in MCV, is no longer indirectly owned by Consumers (through a Consumers subsidiary), but that such subsidiary is now owned directly by its—and Consumers'—parent, *CMS Energy*. *See* July 31, 1991 order, 56 FERC at p. 61,631 n.96 (noting possible change in fact concerning corporate structure); *see also supra* text accompanying note 12 (explaining that a change in facts, while affecting reliance on certification order, does not necessarily defeat QF status). Assuming that CMS Midland's ownership interest in MCV has not increased—and we see nothing in the Michigan Rehearing, the Municipals Rehearing or the Supplemental Filings to demonstrate that it has—such an intracorporate transaction would not appear to affect the facility's ownership status for QF purposes.

[34] *See* Municipals Rehearing at 12-28. The second argument, that the Commission should examine the allegedly anticompetitive circumstances surrounding the MCV facility and effects of certification, Municipals Rehearing at 28-30, raises allegations about com-

we did in the March 1, 1990 order,[35] that the recertification application at issue here presents a specific, limited question for our consideration—whether or not the sale/leaseback transaction, in which some of the purchasers of the facility (the Owner Participants) are electric utility affiliates, results in electric utility entities holding more than fifty percent of the equity interest in the facility.[36] This recertification proceeding does *not* involve the questions that we considered and resolved in the January 31, 1990 order—whether the MCV partnership complies with the Commission's QF ownership requirements and whether the Midland facility complies with the Commission's operating and efficiency requirements for qualifying cogeneration facilities. To the extent, therefore that the Municipals Rehearing attempts to argue those previously resolved issues, we summarily reject the Municipals Rehearing as irrelevant to the issues in the instant recertification.[37]

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petition that, as we have explained, are outside the limited scope of this proceeding. *See supra* text accompanying note 14. The Municipals' third argument, that this recertification proceeding should be consolidated with the earlier recertification proceeding, Municipals Rehearing at 30-31, already has been summarily rejected. *See supra* text accompanying notes 25 & 26.

[35] March 1, ~~1990~~ order, 50 FERC at pp. 61,801-02.

[36] *See* March 1, 1990 order, 50 FERC at pp. 61,793-98, (describing the sale/leaseback transaction in detail).

[37] A significant portion of the Municipals Rehearing argues issues that are not directly related to the sale/leaseback transaction and that were, in any event, fully considered in our prior orders. These issues include: (a) Consumers' alleged control of the Midland facility and the MCV partnership prior to the sale/leaseback, Municipals Rehearing at 5, 13, 16-19; January 31, 1990 order, 50 FERC at pp. 61,289, 61,291-92; (b) the allegedly inflated price of the facility because of the sale of assets from the failed Midland nuclear plant, Municipals Rehearing at 11, 16, 25-26; March 1, 1990 order, 50 FERC at p. 61,799; January 31, 1990 order, 50 FERC at pp. 61,283, 61,286, 61,294; (c) alleged self-dealing of Consumers, Municipals Rehearing at 19, 23; March 1, 1990 order, 50 FERC at p. 61,800; January 31, 1990 order, 50 FERC at pp.

The remaining portion of the Municipals Rehearing that actually addresses the sale/leaseback transaction does not persuade us to amend the March 1, 1990 order in any way. The Municipals assert that the "chief issue" on rehearing is "the extent to which Consumers Power or its affiliates own or control MCV." [38] In the Municipals Rehearing, nonetheless, the Municipals devote most of their arguments to repeating their original arguments in this proceeding [39] and declaring their dissatisfaction with our

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61,292-94; (d) allegedly discriminatory gas contracts in favor of MCV over other Consumers customers, Municipals Rehearing at 20; March 1, 1990 order, 50 FERC at p. 61,799 n.38; January 31, 1990 order, 50 FERC at pp. 61,290, 61,293-94; (e) alleged evasion of regulation by Consumers and affiliates, Municipals Rehearing at 25; July 31, 1991 order, 56 FERC at pp. 61,626-27; January 31, 1991 order, 50 FERC at pp. 61,289, 61,291; and (f) the waiver in the January 31, 1990 order of QF operating and efficiency standards should not have been granted, Municipals Rehearing at 29 n.18; July 31, 1991 order, 56 FERC at p. 61,630; January 31, 1990 order, 50 FERC at pp. 61,303-06.

[38] Municipals Rehearing at 2.

[39] The repeated arguments include: (a) the notes from MCV to MEC Development Corp. to pay for transferred former Midland nuclear assets constitute an equity interest in MCV attributable to Consumers, not debt of the partnership, Municipals Rehearing at 4, 6, 10-11, 26-27; March 1, 1990 order, 50 FERC at pp. 61,798-99, 61,803; (b) the Commission has insufficient information on which to base recertification, Municipals Rehearing at 7-9; March 1, 1990 order, 50 FERC at pp. 61,805-06; (c) special supplemental rent that may be payable by MCV to the Owner Participants constitutes a benefit to Consumers for purposes of its ownership percentage, Michigan Rehearing at 14-15; March 1, 1990 order, 50 FERC at pp. 61,799, 61,803; and (d) Commission precedent establishing that sale/leaseback financing transactions do not generally affect QF status is inapplicable here because of the various roles of Consumers and its affiliates, Michigan Rehearing at 23-25; March 1, 1990 order, 50 FERC at pp. 61,800, 61,802-03. The Municipals also repeat the argument that recertification is impermissible because Consumers has an incentive, as an owner of MCV, to pay high prices

analysis and conclusions in the March 1, 1990 order. Those arguments made by the Municipals that do not merely repeat or rephrase their earlier arguments are similarly irrelevant or unpersuasive, or both.

The Municipals aver that, notwithstanding that CMS Midland holds only a forty-nine percent equity interest in MCV, Consumers is nonetheless in a position to exercise control over MCV.[40] We find that the Municipals opinion on this point to be speculative and unpersuasive.[41] The Municipals offer no evidence to support their belief that Consumers' purported influence can override the MCV partnership agreement to allocate to CMS Midland a disproportionate amount of the benefits flowing from the Midland project. In any event, we analyzed the MCV partnership arrangements and the allocation of benefits in detail in the January 31, 1990 order,[42] and we see no evidence in the Municipals Rehearing to suggest that the sale/leasback alters CMS Midland's role in MCV. We are likewise unpersuaded by the Municipals' implicit suggestion that we should adopt the definition of control used by the Securities and Exchange Commission (the SEC).[43] The SEC administers a different set of statutes and regulations that has no bearing on the limited issues confronting us in this proceeding.

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to MCV, passing the costs on to its ratepayers. *See* Municipals Rehearing at 15, 25; March 1, 1990 order, 50 FERC at p. 61,799. Even if the argument were meritorious, it is not properly addressed to this Commission, because establishing the avoided cost rate paid by utilities to QFs for electricity and approving retail rates paid by customers to franchised utilities are state responsibilities.

[40] Municipals Rehearing at 3, 5, 13-14.

[41] The Municipals, for example, find it "difficult to imagine that MCV could exercise business judgment independent of potential effects on Consumers Power." *Id.* at 13-14.

[42] January 31, 1990 order, 50 FERC at pp. 61,279-82.

[43] Municipals Rehearing at 13.

The Municipals attempt to make much of the fact that at the end of the lease term, MCV will not own the Midland facility but instead will have the option to buy the plant at its fair market value.[44] It is not clear what relevance this has to the facility's QF status, given that MCV, as the operator in control of the facility under the sale/leaseback arrangement, is regarded as the owner for purposes of our regulations notwithstanding the transfer of legal title to the Owner Participants.[45] We note, in any event, that in our experience such lease provisions are common in sale/leaseback transactions.

The Municipals further argue that the Owner Participants' interest in the facility is equity and not debt.[46] This argument is not relevant, as our conclusion in the March 1, 1990 order that the sale/leaseback transaction would not cause electric utility entities to hold more than fifty percent of the equity interest in the facility did not depend upon a characterization of the Owner Participants' interest as debt or equity. To the contrary, we expressly stated that we did not have to resolve that issue.[47]

Both the Municipals Rehearing and the Supplemental Filings[48] rely on numerous Michigan Commission Orders in arguing, *inter alia*, that this Commission must find that Consumers owns and controls the MCV project.[49] The

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[44] Municipals Rehearing at 21.

[45] *See* March 1, 1990 order, 50 FERC at pp. 61,802-03.

[46] Municipals Rehearing at 21-22.

[47] *See* March 1, 1990 order, 50 FERC at pp. 61,802-03.

[48] We emphasize that we include any discussion that follows of material from the impermissible Supplemental Filings solely to demonstrate that the Supplemental Filings, even were there grounds for accepting them, would not have any effect on our decision. *See supra* text accompanying notes 8-11.

[49] *See* Appendices A (May 23, 1990 Michigan Commission Opinion and Order), B (January 31, 1989 Michigan Commission Opinion and

Municipals' reliance is misplaced. As we explained in our July 31, 1991 order, we are not bound by the factual determinations of the Michigan Commission in making our entirely separate determination under federal law whether MCV continues to satisfy the requirements for QF status.[50]

In the Supplemental Filings, the Municipals offer documentation purportedly related to the sale by Consumers to Ontario Hydro of electricity purchased by Consumers from the MCV facility as further evidence of Consumers' alleged control of the MCV project.[51] Specifically, the Municipals argue that the sale to Ontario Hydro "demonstrates the integration of MCV and Consumers Power, in that MCV's generation, where functionally desirable or necessary, is in reality being treated as utility generation of Consumers Power."[52] We disagree. The documents make clear that Consumers, not MCV, is selling electricity to Ontario Hydro. Consumers is obligated, by PURPA and our implementing regulations and by contract, to purchase electricity generated by the Midland facility. Consumers is thereafter entitled to do whatever it wishes (subject, of course, to applicable state and federal regulation) with the electricity it has purchased, including sell it to

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Interim Order) and H (May 3, 1990 Michigan Commission Opinion and Order) to Municipals Supplemental; Appendix K (August 30, 1990 Michigan Commission Opinion) to Joint Supplemental Brief; Items A, B and C (each a May 7, 1991 Michigan Commission Opinion and Order) to Joint Motion to Lodge.

[50] *See* July 31, 1991 order, 56 FERC at pp. 61,627-28. *See also supra* note 11.

[51] *See* Municipals Supplement at 10-11, Appendix G; Municipals Notice of Filing at 2-3. The Municipals Notice of Filing includes two contracts (labeled as "Appendix J" to the Municipals Supplement): (a) Ontario Residual Agreement, dated May 11, 1990, between Consumers and MCV (MCV Residual Agreement); and (b) Interconnection Agreement, dated January 29, 1975, among Consumers, The Detroit Edison Company (Detroit Edison) and Ontario Hydro, as amended (the Interconnection Agreement).

[52] Municipals Notice of Filing at 2-3.

Ontario Hydro. The fact that MCV and Consumers acknowledge by contract that a specified portion of electricity produced by the MCV facility and sold to Consumers will be resold by Consumers to Ontario Hydro [53] has no effect on whether or not the Midland facility is a QF.

The Municipals also argue that the sale of electricity from Consumers to Ontario Hydro raises questions whether transmission services charges payable under the Interconnection Agreement "result in MCV's obtaining transmission service from Consumers Power on terms that are more advantageous than those available to nonaffiliated utilities, such as the members of MMCG [the Municipals]." [54] As noted above, however, Consumers, not MCV, is selling power to Ontario Hydro. As a result, MCV is not receiving any transmission service from Consumers under Consumers' sale to Ontario Hydro. Moreover, we need not even consider the Municipals' allegations, because the issue of transmission access is simply outside the limited scope of this QF recertification proceeding.[55]

Finally, the Joint Supplemental Brief offers a number of agreements apparently executed in connection with the consumption of the sale/leaseback transaction. The Intervenors argue that the contracts demonstrate that CMS Energy and its subsidiaries are subject to more than fifty percent of the potential losses of MCV.[56] The Intervenors' argument on this point is unpersuasive. The contracts cited in most instances do not say what the Intervenors claim that they do. The Intervenors, for example, cite Appendix G as support for the statement that "[a]gain, it is CMS Energy and its subsidiaries who have assumed all

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[53] *See* MCV Residual Agreement at 2.

[54] Municipals Notice of Filing at 3.

[55] *See supra* text accompanying notes 12 & 13-15.

[56] Joint Supplemental Brief at 10-16, Appendices B-D, F-I.

the risk of an MCV obligation." [57] Appendix G in fact is a guaranty by CMS Energy, for the benefit of a bank, *not* of an obligation but of the obligation *only* of CMS Midland under a reimbursement agreement that CMS Midland and the other MCV partners entered into with the bank.[58] Likewise, in other instances in which the Intervenors claim that CMS Energy or a subsidiary is guaranteeing an MCV obligation, a proper reading of the contract cited demonstrates that the only obligation covered is the obligation not of MCV but of CMS Midland.[59]

The Joint Supplemental Brief makes much of Appendix D, an agreement whereby, under certain circumstances, CMS Energy and parent entities of other MCV partners will lend working capital to the partnership, with CMS Energy's share being 52.61 percent of the total. Putting aside the fact that, by the terms of the agreement, the funding would be a subordinated loan, not an equity contribution,[60] any such disparate capital contribution would not affect the facility's compliance with our QF ownership regulations.[61]

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[57] Joint Supplemental Brief at 13. The quoted language apparently refers at least in part to Appendix F, in which CMS Energy guarantees, for the benefit of a bank, the obligations not of MCV but of CMS Gas Marketing Company in its gas sales agreement with MCV. *See* Joint Supplemental Brief, Appendix F at 1-2.

[58] Joint Supplemental Brief, Appendix G at 1.

[59] *Compare* Joint Supplemental Brief at 11-12 *with* Joint Supplemental Brief, Appendix B at 1 and Schedule I (CMS Energy guarantees, for the benefit of an Owner Participant partnership, CMS Midland's proportionate share of MCV's tax guaranty to the Owner Participant partnership) *and* Joint Supplemental Brief at 14 *with* Joint Supplemental Brief, Appendix I at 1-2 and Schedule I (CMS Energy guarantees, for the benefit of an Owner Participant partnership, CMS Midland's share of MCV's obligation to make certain specified payments to the Owner Participant partnership under certain circumstances).

[60] *See* Joint Supplemental Brief, Appendix D at 3.

[61] *See* January 31, 1990 order, 50 FERC at p. 61,288.

In sum, neither the contracts appended to the Joint Supplemental Brief [62] nor the arguments and other materials in the Municipals Rehearing and the Supplemental Filings persuade us that MCV is owned and controlled by Consumers or its affiliates in violation of the QF ownership requirements of PURPA and our implementing regulations. We decline, therefore, to grant rehearing on that point.

The Commission orders:

(A) The Michigan Rehearing of the March 1, 1990 order is hereby denied.

(B) The Municipals Rehearing of the March 1, 1990 order is hereby denied.

(C) The Supplemental Filings, including the Municipals Motion to Lodge, are hereby rejected.

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[62] We note that, in our experience, the types of parent guarantees cited here by the Intervenors as evidence of CMS Energy control of MCV are in fact quite common in sale/leaseback transactions involving electric generating facilities.

APPENDIX H

STATUTORY PROVISIONS

5 U.S.C. § 706 (1988)

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of stautory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a

party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

16 U.S.C. § 796 (1988)

Definitions

The words defined in this section shall have the following meanings for purposes of this chapter, to wit:

(1) "public lands" means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include "reservations", as hereinafter defined;

(2) "reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;

(3) "corporation" means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include "municipalities" as hereinafter defined;

(4) "person" means an individual or a corporation;

(5) "licensee" means any person, State, or municipality licensed under the provisions of section 797 of this title, and any assignee or successor in interest thereof;

(6) "State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States;

(7) "municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

(8) "navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority;

(9) "municipal purposes" means and includes all purposes within municipal powers as defined by the constitution or laws of the State or by the charter of the municipality;

(10) "Government dam" means a dam or other work constructed or owned by the United States for Government purposes with or without contribution from others;

(11) "project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power

therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;

(12) "project works" means the physical structures of a project;

(13) "net investment" in a project means the actual legitimate original cost thereof as defined and interpreted in the "classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission", plus similar costs of additions thereto and betterments therof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a)Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term "cost" shall include insofar as applicable, the elements thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall insofar as applicable be published and promulgated as a part of the rules and regulations of the Commission;

(14) "Commission" and "Commissioner" means the Federal Power Commission, and a member thereof, respectively;

(15) "State commission" means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy to consumers within the State or municipality;

(16) "security" means any note, stock, treasury stock, bond, debenture, or other evidence of interest in or indebtedness of a corporation subject to the provisions of this chapter;

(17)(A) "small power production facility" means a facility which—

(i) produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof; and

(ii) has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts;

(B) "primary energy source" means the fuel or fuels used for the generation of electric energy, except that such term does not include, as determined under rules prescribed by the Commission, in consultation with the Secretary of Energy—

(i) the minimum amounts of fuel required for ignition, startup, testing, flame stabilization, and control uses, and

(ii) the minimum amounts of fuel required to alleviate or prevent—

(I) unanticipated equipment outages, and

(II) emergencies, directly affecting the public health, safety, or welfare, which would result from electric power outages;

(C) "qualifying small power production facility" means a small power production facility—

(i) which the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the Commission may, by rule, prescribe; and

(ii) which is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities);

(D) "qualifying small power producer" means the owner or operator of a qualifying small power production facility;

(18)(A) "cogeneration facility" means a facility which produces—

(i) electric energy, and

(ii) steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes;

(B) "qualifying cogeneration facility" means a cogeneration facility which—

(i) the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe; and

(ii) is owned by a person not primarily engaged in the generation or sale of electric

power (other than electric power solely from cogeneration facilities or small power production facilities);

(C) "qualifying cogenerator" means the owner or operator of a qualifying cogeneration facility;

(19) "Federal power marketing agency" means any agency or instrumentality of the United States (other than the Tennessee Valley Authority) which sells electric energy;

(20) "evidentiary hearings" and "evidentiary proceeding" mean a proceeding conducted as provided in sections 554, 556, and 557 of title 5;

(21) "State regulatory authority" has the same meaning as the term "State commission" except that in the case of an electric utility with respect to which the Tennessee Valley Authority has ratemaking authority (as defined in section 2602 of this title), such term means the Tennessee Valley Authority;

(22) "electric utility" means any person or State agency which sells electric energy; such term includes the Tennessee Valley Authority, but does not include any Federal power marketing agency.

(June 10, 1920, ch. 285, § 3, 41 Stat. 1063; Aug. 26, 1935, ch. 687, title II, § 201, 49 Stat. 838; Nov. 9, 1978, Pub. L. 95-617, title II, § 201, 92 Stat. 3134; June 30, 1980, Pub. L. 96-294, title VI, § 643(a)(1), 94 Stat. 770.)

16 U.S.C. § 824a-3 (1988)

Cogeneration and small power production

(a) Cogeneration and small power production rules

Not later than 1 year after November 9, 1978, the Commission shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production, and to encourage geothermal small power production facilities of not more than 80 megawatts capacity, which rules require electric utilities to offer to—

(1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities [1] and

(2) purchase electric energy from such facilities.

Such rules shall be prescribed, after consultation with representatives of Federal and State regulatory agencies having ratemaking authority for electric utilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments. Such rules shall include provisions respecting minimum reliability of qualifying cogeneration facilities and qualifying small power production facilities (including reliability of such facilities during emergencies) and rules respecting reliability of electric energy service to be available to such facilities from electric utilities during emergencies. Such rules may not authorize a qualifying cogeneration facility or qualifying small power production facility to make any sale for purposes other than resale.

(b) Rates for purchases by electric utilities

The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to

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[1] So in original. Probably should be followed by a comma.

offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase—

(1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and

(2) shall not discriminate against qualifying cogenerators or qualifying small power producers.

No such rule prescribed under subsection (a) of this section shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.

(c) Rates for sales by utilities

The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to sell electric energy to any qualifying cogeneration facility or qualifying small power production facility, the rates for such sale—

(1) shall be just and reasonable and in the public interest, and

(2) shall not discriminate against the qualifying cogenerators or qualifying small power producers.

(d) "Incremental cost of alternative electric energy" defined

For purposes of this section, the term "incremental cost of alternative electric energy" means, with respect to electric energy purchased from a qualifying cogenerator or qualifying small power producer, the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.

(e) Exemptions

(1) Not later than 1 year after November 9, 1978, and from time to time thereafter, the Commission shall, after consultation with representatives of State regulatory authorities, electric utilities, owners of cogeneration facilities and owners of small power production facilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments, prescribe rules under which geothermal small power production facilities of not more than 80 megawatts capacity, qualifying cogeneration facilities, and qualifying small power production facilities are exempted in whole or part from the Federal Power Act [16 U.S.C. 791a et seq.], from the Public Utility Holding Company Act [15 U.S.C. 79 et seq.], from State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities, or from any combination of the foregoing, if the Commission determines such exemption is necessary to encourage cogeneration and small power production.

(2) No qualifying small power production facility which has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), exceeds 30 megawatts, or 80 megawatts for a qualifying small power production facility using geothermal energy as the primary energy source, may be exempted under rules under paragraph (1) from any provision of law or regulation referred to in paragraph (1), except that any qualifying small power production facility which produces electric energy solely by the use of biomass as a primary energy source, may be exempted by the Commission under such rules from the Public Utility Holding Company Act [15 U.S.C. 79 et seq.] and from State laws and regulations referred to in such paragraph (1).

(3) No qualifying small power production facility or qualifying cogeneration facility may be exempted under this subsection from—

(A) any State law or regulation in effect in a State pursuant to subsection (f) of this section,

(B) the provisions of section 210, 211, or 212 of the Federal Power Act [16 U.S.C. 824i, 824j, or 824k] or the necessary authorities for enforcement of any such provision under the Federal Power Act [16 U.S.C. 791a et seq.], or

(C) any license or permit requirement under part I of the Federal Power Act [16 U.S.C. 791a et seq.] any provision under such Act related to such a license or permit requirement, or the necessary authorities for enforcement of any such requirement.

(f) Implementation of rules for qualifying cogeneration and qualifying small power production facilities

(1) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) of this section or revised under such subsection, each State regulatory authority shall, after notice and opportunity for public hearing, implement such rule (or revised rule) for each electric utility for which it has ratemaking authority.

(2) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) of this section or revised under such subsection, each nonregulated electric utility shall, after notice and opportunity for public hearing, implement such rule (or revised rule).

(g) Judicial review and enforcement

(1) Judicial review may be obtained respecting any proceeding conducted by a State regulatory authority or nonregulated electric utility for purposes of implementing

any requirement of a rule under subsection (a) of this section in the same manner, and under the same requirements, as judicial review may be obtained under section 2633 of this title in the case of a proceeding to which section 2633 of this title applies.

(2) Any person (including the Secretary) may bring an action against any electric utility, qualifying small power producer, or qualifying cogenerator to enforce any requirement established by a State regulatory authority or nonregulated electric utility pursuant to subsection (f) of this section. Any such action shall be brought only in the manner, and under the requirements, as provided under section 2633 of this title with respect to an action to which section 2633 of this title applies.

(h) Commission enforcement

(1) For purposes of enforcement of any rule prescribed by the Commisison under subsection (a) of this section with respect to any operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility which are subject to the jurisdiction of the Commission under part II of the Federal Power Act [16 U.S.C. 824 et seq.], such rule shall be treated as a rule under the Federal Power Act [16 U.S.C. 791a et seq.]. Nothing in subsection (g) of this section shall apply to so much of the operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility as are subject to the jurisdiction of the Commission under part II of the Federal Power Act.

(2)(A) The Commission may enforce the requirements of subsection (f) of this section against any State regulatory authority or nonregulated electric utility. For purposes of any such enforcement, the requirements of subsection (f)(1) of this section shall be treated as a rule enforceable under the Federal Power Act [16 U.S.C. 791a et seq.]. For purposes of any such action, a State regu-

latory authority or nonregulated electric utility shall be treated as a person within the meaning of the Federal Power Act. No enforcement action may be brought by the Commisison under this section other than—

(i) an action against the State regulatory authority or nonregulated electric utility for failure to comply with the requirements of subsection (f) of this section [2] or

(ii) an action under paragraph (1).

(B) Any electric utility, qualifying cogenerator, or qualifying small power producer may petition the Commission to enforce the requirements of subsection (f) of this section as provided in subparagraph (A) of this paragraph. If the Commission does not initiate an enforcement action under subparagraph (A) against a State regulatory authority or nonregulated electric utility within 60 days following the date on which a petition is filed under this subparagraph with respect to such authority, the petitioner may bring an action in the appropriate United States district court to require such State regulatory authority or nonregulated electric utility to comply with such requirements, and such court may issue such injunctive or other relief as may be appropriate. The Commission may intervene as a matter of right in any such action.

(i) Federal contracts

No contract between a Federal agency and any electric utility for the sale of electric energy by such Federal agency for resale which is entered into after November 9, 1978, may contain any provision which will have the effect of preventing the implementation of any rule under this section with respect to such utility. Any provision in any such contract which has such effect shall be null and void.

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[2] So in original. Probably should be followed by a comma.

(j) New dams and diversions

Except for a hydroelectric project located at a Government dam (as defined in section 3(10) of the Federal Power Act [16 U.S.C. 796(10)] at which non-Federal hydroelectric development is permissible, this section shall not apply to any hydroelectric project which impounds or diverts the water of a natural watercourse by means of a new dam or diversion unless the project meets each of the following requirements:

(1) No substantial adverse effects

At the time of issuance of the license or exemption for the project, the Commission finds that the project will not have substantial adverse effects on the environment, including recreation and water quality. Such finding shall be made by the Commission after taking into consideration terms and conditions imposed under either paragraph (3) of this subsection or section 10 of the Federal Power Act [16 U.S.C. 803] (whichever is appropriate as required by that Act [16 U.S.C. 791a et seq.] or the Electric Consumers Protection Act of 1986) and compliance with other environmental requirements applicable to the project.

(2) Protected rivers

At the time the application for a license or exemption for the project is accepted by the Commission (in accordance with the Commission's regulations and procedures in effect on January 1, 1986, including those relating to environmental consultation), such project is not located on either of the following:

(A) Any segment of a natural watercourse which is included in (or designated for potential inclusion in) a State or national wild and scenic river system.

(B) Any segment of a natural watercourse which the State has determined, in accordance with applicable State law, to possess unique natural, recreational, cultural, or scenic attributes which would be adversely affected by hydroelectric development.

(3) Fish and wildlife terms and conditions

The project meets the terms and conditions set by fish and wildlife agencies under the same procedures as provided for under section 30(c) of the Federal Power Act [16 U.S.C. 823a(c)].

(k) Definition of new dam or diversion

For purposes of this section, the term "new dam or diversion" means a dam or diversion which requires, for purposes of installing any hydroelectric power project, any construction, or enlargement of any impoundment or diversion structure (other than repairs or reconstruction or the addition of flashboards or similar adjustable devices).

(*l*) Definitions

For purposes of this section, the terms "small power production facility", "qualifying small power production facility", "qualifying small power producer", "primary energy source", "cogeneration facility", "qualifying cogeneration facility", and "qualifying cogenerator" have the respective meanings provided for such terms under section 3(17) and (18) of the Federal Power Act [16 U.S.C. 796(17), (18)].

(Pub. L. 95-617, title II, § 210, Nov. 9, 1978, 92 Stat. 3144; Pub. L. 96-294, title VI, § 643(b), June 30, 1980, 94 Stat. 770; Pub. L. 99-495, § 8(a), Oct. 16, 1986, 100 Stat. 1249.)

16 U.S.C. § 824d (1988)

Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the

proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

(June 10, 1920, ch. 285, § 205, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 851, and amended Nov. 9, 1978, Pub. L. 95-617, title II, §§ 207(a), 208, 92 Stat. 3142.)

16 U.S.C. § 824e (1988)

Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affected such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund orders; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period. In the case of a proceeding instituted by the

Commission on its own motion, the refund effective date shall not be earlier than the date 60 days after the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the expiration of such 60-day period. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order the public utility to make refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided,* That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest,

to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C. 79 et seq.].

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means

of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(June 10, 1920, ch. 285, § 206, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 852, and amended Oct. 6, 1988, Pub. L. 100-473, § 2, 102 Stat. 2299.)

APPENDIX I

Regulatory Provisions

18 C.F.R. § 292.101 (1993)

Definitions.

(a) *General rule.* Terms defined in the Public Utility Regulatory Policies Act of 1978 (PURPA) shall have the same meaning for purposes of this part as they have under PURPA, unless further defined in this part.

(b) *Definitions.* The following definitions apply for purposes of this part.

(1) *Qualifying facility* means a cogeneration facility or a small power production facility which is a qualifying facility under Subpart B of this part of the Commission's regulations.

(2) *Purchase* means the purchase of electric energy or capacity or both from a qualifying facility by an electric utility.

(3) *Sale* means the sale of electric energy or capacity or both by an electric utility to a qualifying facility.

(4) *System emergency* means a condition on a utility's system which is likely to result in imminent significant disruption of service to customers or is imminently likely to endanger life or property.

(5) *Rate* means any price, rate, charge, or classification made, demanded, observed or received with respect to the sale or purchase of electric energy or capacity, or any rule, regulation, or practice respecting any such rate, charge, or classification, and any contract pertaining to the sale or purchase of electric energy or capacity.

(6) *Avoided costs* means the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source.

(7) *Interconnection costs* means the reasonable costs of connection, switching, metering, transmission, distribution, safety provisions and administrative costs incurred by the electric utility directly related to the installation and maintenance of the physical facilities necessary to permit interconnected operations with a qualifying facility, to the extent such costs are in excess of the corresponding costs which the electric utility would have incurred if it had not engaged in interconnected operations, but instead generated an equivalent amount of electric energy itself or purchased an equivalent amount of electric energy or capacity from other sources. Interconnection costs do not include any costs included in the calculation of avoided costs.

(8) *Supplementary power* means electric energy or capacity supplied by an electric utility, regularly used by a qualifying facility in addition to that which the facility generates itself.

(9) *Back-up power* means electric energy or capacity supplied by an electric utility to replace energy ordinarily generated by a facility's own generation equipment during an unscheduled outage of the facility.

(10) *Interruptible power* means electric energy or capacity supplied by an electric utility subject to interruption by the electric utility under specified conditions.

(11) *Maintenance power* means electric energy or capacity supplied by an electric utility during scheduled outages of the qualifying facility.

(Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2601 *et seq.*, Energy Supply and Environmental Coordination Act, 15 U.S.C. 791 *et seq.* Federal Power Act, 16 U.S.C. 792 *et seq.*, Department of Energy Organization Act, 42 U.S.C. 7101 *et seq.*, E.O. 12009, 42 FR 46267)

[45 FR 12233, Feb. 25, 1980]

18 C.F.R. § 292.205 (1993)

Criteria for qualifying cogeneration facilities.

(a) *Operating and efficiency standards for topping-cycle facilities*—(1) *Operating standard.* For any topping-cycle cogeneration facility, the useful thermal energy output of the facility must, during any calendar year period, be no less than 5 percent of the total energy output.

(2) *Efficiency standard.* (i) For any topping-cycle cogeneration facility for which any of the energy input is natural gas or oil, and the installation of which began on or after March 13, 1980, the useful power output of the facility plus one-half the useful thermal energy output, during any calendar years period, must:

(A) Subject to paragraph (a)(2)(i)(B) of this section be no less than 42.5 percent of the total energy input, during any calendar year period, must:

(B) If the useful thermal energy output is less than 15 percent of the total energy output of the facility, be no less than 45 percent of the total energy input of natural gas and oil to the facility.

(ii) For any topping-cycle cogeneration facility not subject to paragraph (a)(2)(i) of this section there is no efficiency standard.

(b) *Efficiency standards for bottoming-cycle facilities.* (1) For any bottoming-cycle cogeneration facility for which any of the energy output as supplementary firing is natural gas or oil, and the installation of which began on or after March 13, 1980, the useful power ouput of the facility must, during any calendar year period, be no less than 45 percent of the energy input of natural gas and oil for supplementary firing.

(2) For any bottoming-cycle cogeneration facility not covered by paragraph (b)(1) of this section, there is no efficiency standard.

(c) *Waiver.* The Commission may waive any of the requirements of paragraphs (a) and (b) of this section upon a showing that the facility will produce significant energy savings.

[45 FR 17972, Mar. 20, 1980, as amended by Order 478, 52 FR 28467, July 30, 1987]

18 C.F.R. § 292.206 (1993)

Ownership criteria.

(a) *General rule.* A cogeneration facility or small power production facility may not be owned by a person primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities).

(b) *Ownership test.* For purposes of this section, a cogeneration or small power production facility shall be considered to be owned by a person primarily engaged in the generation or sale of electric power, if more than 50 percent of the equity interest in the facility is held by an electric utility or utilities, or by an electric utility holding company, or companies, or any combination thereof. If a wholly or partially owned subsidiary of an electric utility or electric utility holding company has an ownership interest of a facility, the subsidiary's ownership interest shall be considered as ownership by an electric utility or electric utility holding company.

(c) *Exceptions.* For purposes of this section a company shall not be considered to be an "electric utility" company if it:

(1) Is a subsidiary of an electric utility holding company which is exempt by rule or order adopted or issued pursuant to section 3(a)(3) or 3(a)(5) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79c (a)(3), 79c(a)(5); or

(2) Is declared not to be an electric utility company by rule or order of the Securities and Exchange Commission pursuant to section 2(a)(3)(A) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79b (a)(3)(A).

[45 FR 17972, Mar. 20, 1980, as amended by Order 70-B, 45 FR 52780, Aug. 8, 1980; Order 70-D, 46 FR 11253, Feb. 6, 1981]

18 C.F.R. § 292.207 (1993)

Procedures for obtaining qualifying status.

(a) *Qualification.* (1) A small power production facility or cogeneration facility which meets the criteria for qualification set forth in § 292.203 is a qualifying facility.

(2) The owner or operator of any facility qualifying under this paragraph shall furnish notice to the Commission providing the information set forth in paragraphs (b)(2) (i) through (iv) of this section.

(b) *Optional procedure*—(1) *Application for Commission certification.* Pursuant to the provisions of this paragraph, the owner or operator of the facility may file with this Commission an application for Commission certification that the facility is a qualifying facility.

(2) *General contents of application.* The application must be accompanied by the fee prescribed in § 381.505 of this chapter and must contain the following information:

(i) The name and address of the applicant and location of the facility;

(ii) A brief description of the facility, including a statement indicating whether such facility is a small power production facility or a cogeneration facility;

(iii) The primary energy source used or to be used by the facility;

(iv) The power production capacity of the facility; and

(v) The percentage of ownership by any electric utility or by any electric utility holding company, or by any person owned by either.

(3) *Additional application requirements for small power production facilities.* An application by a small power producer for Commission certification shall contain the following additional information:

(i) The location of the facility in relation to any other small power production facilities located within one mile of the facility, owned by the applicant which use the same energy source; and

(ii) Information identifying any planned usage of natural gas, oil or coal.

(4) *Additional application requirements for cogeneration facilities.* An application by a cogenerator for Commission certification shall contain the following additional information:

(i) A description of the cogeneration system, including whether the facility is a topping or bottoming cycle and sufficient information to determine that any applicable requirements under § 292.205 will be met; and

(ii) The date installation of the facility began or will begin.

(5) *Commisison action.* Within 90 days of the filing of an application, the Commission shall issue an order granting or denying the application, tolling the time for issuance of an order, or setting the matter for hearing. Any order denying certification shall identify the specific requirements which were not met. If no order is issued within 90 days of the filing of the complete application, it shall be deemed to have been granted.

(6) *Notice.* (i) Applications for certification filed under this paragraph shall include a copy of a notice of the

request for certification for publication in the FEDERAL REGISTER. The notice shall state the applicant's name, the date of the application, and a brief description of the facility for which qualification is sought. This description shall include:

(A) A statement indicating whether such facility is a small power production facility or a cogeneration facility;

(B) The primary energy source used or to be used by the facility;

(C) The power production capacity of the facility; and

(D) The location of the facility.

(ii) The notice shall be in the following form:

(Name of Applicant)
Docket No. QF-

NOTICE OF APPLICATION FOR COMMISSION CERTIFICATION OF QUALIFYING STATUS OF A (SMALL POWER PRODUCTION) (COGENERATION) FACILITY

On (date application was filed), (name and address of applicant) filed with the Federal Energy Regulatory Commission an application to be certified as a qualifying (small power production) (cogeneration) facility pursuant to § 292.207 of the Commission's rules.

[Brief description of the facility].

Any person desiring to be heard or objecting to the granting of qualifying status should file a petition to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426,

in accordance with §§ 385.209 and 385.214 of this chapter. All such petitions or protests must be filed within 30 days after the date of publication of this notice and must be served on the applicant. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

(c) *Notice requirements for facilities of 500 kW or more.* An electric utility is not required to purchase electric energy from a facility with a design capacity of 500 kW or more until 90 days after the facility notifies the utility that it is a qualifying facility, or 90 days after the facility has applied to the Commission under paragraph (b) of this section.

(d) *Revocation of qualifying status.* (1) The Commission may revoke the qualifying status of a qualifying facility which has been certified under this section if such facility fails to comply with any of the satetments contained in its application for Commisison certification.

(2) Prior to undertaking any substantial alteration or modification of a qualifying facility which has been certified under this section, a small power producer or cogenerator may apply to the Commission for a determination that the proposed alteration or modification will not result in a revocation of qualifling status.

[45 FR 17972, Mar. 20, 1980, as amended by Order 70-A, 45 FR 33603, May 20, 1980; Order 70-B, 45 FR 52780, Aug. 8, 1980; Order 225, 47 FR 19058, May 3, 1982; Order 435, 50 FR 40358, Oct. 3, 1985; Order 494, 53 FR 15381, Apr. 29, 1988]

18 C.F.R. § 292.304 (1993)

Rates for purchases.

(a) *Rates for purchases.* (1) Rates for purchases shall:

(i) Be just and reasonable to the electric consumer of the electric utility and in the public interest; and

(ii) Not discriminate against qualifying cogeneration and small power production facilities.

(2) Nothing in this subpart requires any electric utility to pay more than the avoided costs for purchases.

(b) *Relationship to avoided costs.* (1) For purposes of this paragraph, "new capacity" means any purchase from capacity of a qualifying facility, construction of which was commenced on or after November 9, 1978.

(2) Subject to paragraph (b)(3) of this section, a rate for purchases satisfies the requirements of paragraph (a) of this section if the rate equals the avoided costs determined after consideration of the factors set forth in paragraph (e) of this section.

(3) A rate for purchases (other than from new capacity) may be less than the avoided cost if the State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or the nonregulated electric utility determines that a lower rate is consistent with paragraph (a) of this section, and is sufficient to encourage cogeneration and small power production.

(4) Rates for purchases from new capacity shall be in accordance with paragraph (b)(2) of this section, regardless of whether the electric utility making such purchases is simultaneously making sales to the qualifying facility.

(5) In the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this

subpart if the rates for such purchases differ from avoided costs at the time of delivery.

(c) *Standard rates for purchases.* (1) There shall be put into effect (with respect to each electric utility) standard rates for purchases from qualifying facilities with a design capacity of 100 kilowatts or less.

(2) There may be put into effect standard rates for purchases from qualifying facilities with a design capacity of more than 100 kilowatts.

(3) The standard rates for purchases under this paragraph:

(i) Shall be consistent with paragraphs (a) and (e) of this section; and

(ii) May differentiate among qualifying facilities using various technologies on the basis of the supply characteristics of the different technologies.

(d) *Purchases "as available" or pursuant to a legally enforceable obligation.* Each qualifying facility shall have the option either:

(1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or

(2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:

(i) The avoided costs calculated at the time of delivery; or

(ii) The avoided costs calculated at the time the obligation is incurred.

(e) *Factors affecting rates for purchases.* In determining avoided costs, the following factors shall, to the extent practicable, be taken into account:

(1) The data provided pursuant to § 292.302(b), (c), or (d), including State review of any such data;

(2) The availability of capacity or energy from a qualifying facility during the system daily and seasonal peak periods, including:

(i) The ability of the utility to dispatch the qualifying facility;

(ii) The expected or demonstrated reliability of the qualifying facility;

(iii) The terms of any contract or other legally enforceable obligation, including the duration of the obligation, termination notice requirement and sanctions for noncompliance;

(iv) The extent to which scheduled outages of the qualifying facility can be usefully coordinated with scheduled outages of the utility's facilities;

(v) The usefulness of energy and capacity supplied from a qualifying facility during system emergencies, including its ability to separate its load from its generation;

(vi) The individual and aggregate value of energy and capacity from qualifying facilities on the electric utility's system; and

(vii) The smaller capacity increments and the shorter lead times available with additions of capacity from qualifying facilities; and

(3) The relationship of the availability of energy or capacity from the qualifying facility as derived in paragraph (e)(2) of this section, to the ability of the electric utility to avoid costs, including the deferral of capacity additions and the reduction of fossil fuel use; and

(4) The costs or savings resulting from variations in line losses from those that would have existed in the

absence of purchases from a qualifying facility, if the purchasing electric utility generated an equivalent amount of energy itself or purchased an equivalent amount of electric energy or capacity.

(f) *Periods during which purchases not required.* (1) Any electric utility which gives notice pursuant to paragraph (f)(2) of this section will not be required to purchase electric energy or capacity during any period during which, due to operational circumstances, purchases from qualifying facilities will result in costs greater than those which the utility would incur if it did not make such purchases, but instead generated an equivalent amount of energy itself.

(2) Any electric utility seeking to invoke paragraph (f)(1) of this section must notify, in accordance with applicable State law or regulation, each affected qualifying facility in time for the qualifying facility to cease the delivery of energy or capacity to the electric utility.

(3) Any electric utility which fails to comply with the provisions of paragraph (f)(2) of this section will be required to pay the same rate for such purchase of energy or capacity as would be required had the period described in paragraph (f)(1) of this section not occurred.

(4) A claim by an electric utility that such a period has occurred or will occur is subject to such verification by its State regulatory authority as the State regulatory authority determines necessary or appropriate, either before or after the occurrence.

18 C.F.R. § 292.601 (1993)

Exemption to qualifying facilities from the Federal Power Act.

(a) *Applicability.* This section applies to qualifying facilities, other than those described in paragraph (b) of this section.

(b) *Exclusion.* This section does not apply to a qualifying small power production facility with a power production capacity which exceeds 30 megawatts, if such facility uses any primary energy source other than geothermal resources.

(c) *General rule.* Any qualifying facility described in paragraph (a) of this section shall be exempt from all sections of the Federal Power Act, except:

(1) Section 1-18, and 21-30;

(2) Sections 202(c), 210, 211, and 212;

(3) Sections 305(c); and

(4) Any necessary enforcement provision of Part III with regard to the sections listed in paragraphs (c)(1), (2) and (3) of this section.

(Energy Security Act, Pub. L. 96-294, 94 Stat. 611 (1980) Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2601, *et seq.*, Energy Supply and Environmental Coordination Act, 15 U.S.C. 791, *et seq.*, Federal Power Act, as amended, 16 U.S.C. 792 *et seq.*, Department of Energy Organization Act, 42 U.S.C. 7101, *et seq.*; E.O. 12009, 42 FR 46267)

[Order 135, 46 FR 19232, Mar. 30, 1981]

18 C.F.R. § 292.602 (1993)

Exemption to qualifying facilities from the Public Utility Holding Company Act and certain State law and regulation.

(a) *Applicability.* This section applies to any qualifying facility described in § 292.601(a), and to any qualifying small power production facility with a power production capacity over 30 megawatts if such facility produces electric energy solely by the use of biomass as a primary energy source.

(b) *Exemption from the Public Utility Holding Company Act of 1935.* A qualifying facility described in paragraph (a) of this section or a utility geothermal small power production facility shall not be considered to be an "electric utility company" as defined in section 2(a)(3) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79b(a)(3).

(c) *Exemption from certain State law and regulation.* (1) Any qualifying facility shall be exempted (except as provided in paragraph (c)(2)) of this section from State law or regulation respecting:

(i) The rates of electric utilities; and

(ii) The financial and organizational regulation of electric utilities.

(2) A qualifying facility may not be exempted from State law and regulation implementing subpart C.

(3) Upon request of a State regulatory authority or nonregulated electric utility, the Commission may consider a limitation on the exemptions specified in paragraph (c)(1) of this section.

(4) Upon request of any person, the Commission may determine whether a qualifying facility is exempt from a particular State law or regulation.

(Energy Security Act, Pub. L. 96-294, 94 Stat. 611 (1980) Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2601, *et seq.*, Energy Supply and Environmental Coordination Act, 15 U.S.C. 791, *et seq.*, Federal Power Act, as amended, 16 U.S.C. 792, *et seq.*, Department of Energy Organization Act, 42 U.S.C. 7101, *et seq.*; E.O. 12009, 42 FR 46267)

[45 FR 12237, Feb. 25, 1980, as amended by Order 135, 46 FR 19232, Mar. 30, 1981]

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No. 93-332

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MICHIGAN MUNICIPAL COOPERATIVE GROUP and
THE STATE OF MICHIGAN,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION and
MIDLAND COGENERATION VENTURE, L.P.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE MICHIGAN MUNICIPAL LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

RICHARD A. WEGMAN
Counsel of Record
GARVEY, SCHUBERT AND BARER
1000 Potomac Street, N.W.
Fifth Floor
Washington, D.C. 20007
(202) 965-7880
Counsel for
Michigan Municipal League

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BRIEF OF THE MICHIGAN MUNICIPAL LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

The Michigan Municipal League ("League"), pursuant to Rule 37 of the Rules of the Supreme Court of the United States, hereby submits this brief as *amicus curiae,* in support of the "Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit," filed on August 31, 1993, by Michigan Municipal Cooperative Group and the State of Michigan (the "Petition for Certiorari").[1]

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[1] Letters of consent from the parties below are being filed with the Court simultaneously with the filing of this *amicus* brief.

AUTHORITIES INVOLVED

The authorities involved are set out at page two of the Petition for Certiorari and in its Statutory Appendix.

INTEREST OF THE MICHIGAN MUNICIPAL LEAGUE

The Michigan Municipal League is the association for cities and villages in Michigan. Five hundred nine communities are members of the League, and its member communities represent over 98 percent of Michigan's urban population. The League was formed in 1899 and works to strengthen local government and to represent its interests in a variety of fora, including matters before the courts that may have significant impacts on municipalities, their businesses and residents.

Among the interests of the communities in the League are the cost of electricity and the ability of regulatory agencies to effectively regulate the rates charged municipalities, their businesses and residents for electricity. The orders of the Federal Energy Regulatory Commission ("Commission") impair both federal regulation of electricity at the wholesale level and state regulation of electricity at the retail level. As a result, all residents and businesses of the communities represented by the League, whether those communities are served by private utilities, such as Consumers Power Company, or by municipally-owned utilities, such as the utilities comprising the Petitioner Michigan Municipal Cooperative Group, are affected by the decisions of the Commission.

The interest of the cities and villages in the League in electricity costs also drives their concern about the availability in wholesale power markets of the lowest cost electricity possible. League members who own their own municipal electric systems want to purchase low-cost electricity in these wholesale markets. League members who are served by private utilities are similarly affected by whether low-cost electricity is available in such wholesale

markets. Fair competition in these markets will tend to keep costs and rates lower for all electricity users.

The communities represented by the League have a direct interest in ensuring that electricity costs remain reasonably priced for the well-being of their municipalities, their businesses and residents. Because the Commission's decisions adversely affect this interest, the League respectfully submits this brief.

STATEMENT OF THE CASE

The Michigan Municipal League adopts the statement in the Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

This case merits the Court's review because the Federal Energy Regulatory Commission's orders will cause hundreds of millions, if not billions, of dollars in excessive electricity costs to Michigan consumers. As a result of the Commission's orders, ratepayers in Michigan will pay excessive rates for power purchased by Consumers Power Company from its Midland Cogeneration Venture ("MCV") affiliate. But for the interaffiliate, non-arm's-length transactions arranged by Consumers Power, and ignored by the Commission below, Consumers Power could have built its MCV project for one-third to one-half of its $2.3 billion cost. At a time when Michigan's cities and villages are reeling from budget constraints affecting their abilities to meet public needs for essential services, such as public health and safety, the Commission's orders will have adverse economic impacts on every Michigan community. Moreover, the case has important national implications, because of the Commission's refusal to defer to findings of a state agency, which were upheld upon appeal, and because of the anticompetitive consequences of permitting utilities to purchase power from their affiliates.

Michigan's cities and villages are adversely affected in multiple ways. First, the costs to municipally-owned electric systems of providing service will increase. There are twenty-eight such systems in Michigan's Lower Peninsula, serving approximately 1.4 million residents with electric power or street lighting, or both. Their cost of providing service will increase because of the unnecessarily increased cost of power which may be purchased from Consumers Power Company (and indirectly from MCV, Consumers Power's affiliate). Their cost of providing service will also increase because of the incentives created for Consumers Power to use its monopoly control over the electric transmission network and over wholesale and retail electric markets to distort the competitive marketplace for economical alternative sources of electricity. Consumers Power has every incentive to use its monopoly power to protect the market for power from its high-priced MCV affiliate.

Second, those cities and villages served not by municipal electric systems but by privately-owned utilities will experience increased costs from higher rates paid to the private utilities, such as Consumers Power. As the Petitioners pointed out, the record below suggests that in Michigan alone the rate impact of the Commission's orders could be on the order of four billion dollars. This stems from Consumers Power's passing through to its customers the inflated price of its purchases from its MCV affiliate. In addition, Consumers Power's actions with regard to MCV through power exchange agreements increase the costs of Michigan's other major private utility, Detroit Edison Company, thus putting upward pressure on the rates paid by the communities that company serves.[2]

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[2] Consumers Power and Detroit Edison buy and sell electricity from each other through an electric power pool to try to obtain the lowest cost electricity possible to serve the combined needs of their customers. If the cost of MCV's electricity increases and if Consumers Power has incentives to purchase electricity from MCV,

Third, the excessive electricity costs will unnecessarily increase the costs to all cities and villages of providing services to meet basic and vital public needs. Electricity costs are a significant element in the costs of municipal functions, such as the operating costs of water and wastewater (sewer) systems. Electricity costs are the primary cost in lighting city streets, and electricity costs contribute substantially to the cost of lighting, heating and cooling of public buildings. Clearly, electricity is a major item in any city or village budget.

Fourth, in an increasingly tough and competitive global economy, excessive electricity costs also impose burdens on needed economic development throughout Michigan by raising the costs to industries and businesses. This affects not only industries already located in Michigan but also those considering locating or expanding in the state. Michigan's economy continues to be heavily reliant on manufacturing. Unnecessarily high electricity costs place an economic burden on all residents and businesses in Michigan.

The adverse consequences of the Commission's orders are not limited to consumers and businesses in Michigan. The Commission's effective deregulation of rates from cogeneration power plants owned by utility affiliates invites copy-cat projects nationwide, with corresponding proliferation of excessive electricity costs measured potentially in the tens or more of billions of dollars. Furthermore, utilities will have incentives to favor purchases from their affiliates instead of from independent sellers. The anticompetitive consequences of such actions, including upward pressure on rates, along with the incentives for utilities to set up such affiliates to avoid regulation,

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even though less expensive electricity is available from other sources, both Detroit Edison's and Consumers Power's cost of electricity increases. This imposes unnecessary burdens on the municipalities, their businesses and residents who must purchase electricity from these companies.

greatly impair regulation designed to protect consumers against excessive rates.

The Commission's actions improperly interfere with the ability of the Michigan Public Service Commission and comparable state regulatory agencies nationwide to regulate electric rates effectively. The existing monopoly structure of the electric utility industry requires effective regulation. *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 758-59 (1973). By ignoring the restrictions on utility ownership of qualifying facilities under the Public Utility Regulatory Policies Act (PURPA), 16 U.S.C. § 796(18)(B)(ii) (1988), the Commission has created a loophole that will defeat cost-based regulation by either the states or the Commission of cogeneration power plants owned by utility affiliates, contrary to the purposes of PURPA and to the basic tenets of federalism.

The Commission also improperly disregarded findings by the Michigan Public Service Commission as to the identity of interests between Consumers Power Company and its supposedly independent MCV affiliate. *See, e.g., Consumers Power Co.*, 112 PUR 4th 241, 256 (Mich. PSC 1990). Inexplicably, in erroneously concluding that MCV qualified for a PURPA exemption from state and federal regulation, the Commission ignored these reasoned Michigan Public Service Commission decisions, which were upheld and echoed by the Michigan Court of Appeals. *See, e.g., CMS Energy Corp. v. Attorney General*, 190 Mich. App. 220, 232, 475 N.W.2d 451, 456, *leave denied*, 437 Mich. 918 (1991). Such total disregard of state regulation—and of state agency decisions—warrants review by this Court. *See University of Tennessee v. Elliott*, 478 U.S. 788, 798 (1986). Moreover, the Commission's disregard of the state decisions, contrary to established doctrines of deference, res judicata and collateral estoppel, affects not only Michigan but also implicates the relationship between federal agencies and state agencies across the nation.

The non-arm's-length affiliate transactions, which the Commission's decisions sanction, were used by Consumers Power to improperly inflate the "costs" of the MCV power plant and thus to mask Consumers Power's actual profits from (and ownership share of) its MCV affiliate.[3] MCV's "costs" were unnecessarily inflated to the benefit of Consumers Power by MCV's paying $1.2 to $1.5 billion to Consumers Power for essentially worthless assets from Consumers Power's abandoned Midland nuclear power plant. The uselessness of the nuclear plant assets is demonstrated by the fact that MCV, having spent $1.2 billion for the assets, then spent more to complete the plant (an additional $1.1 billion, for a total "cost" of $2.3 billion) than it should have cost to build the plant from scratch. A similar gas-fired generating plant could have been built by Consumers Power or any number of other private companies without the nuclear plant assets for about $800 million, i.e., for one-third to one-half the "cost" of the MCV plant. The difference—plus some—is what Consumers Power is charging its customers in excessive rates. Building the MCV gas-fired plant with nuclear plant assets was about as cost-effective as converting a space shuttle into a Boeing 737—it can be done, but it is much cheaper to just build a 737. Whatever happens, passengers (and whole states) should not pay high fares for decades based upon grossly uneconomic conversions.[4]

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[3] By masking Consumers Power's profits, MCV sought to support its position that it was not more than 50% owned by a utility, Consumers Power, as required by the Commission's regulations, 18 C.F.R. § 292.206(b) (1993), attempting to implement PURPA's prohibition of utility ownership of qualifying facilities. 16 U.S.C. § 796(18)(B)(ii). The Commission's measures of ownership include looking at the percentage of profits that go to the utility. *Ultrapower 3*, 27 FERC ¶ 61,094 (1984).

[4] Consumers Power went further still and attempted to transfer to its unregulated parent company, CMS Energy Corporation, the $1.2 to $1.5 billion payment it received for the worthless assets. When corporate affiliates transfer assets between themselves at inflated prices for improper advantage, the Commission's function

In the case of MCV alone, hundreds of millions of dollars of excessive electricity costs result from the Commission's acceptance of the utility affiliate's formalistic statements without investigating the substance of the intercorporate relationships or the underlying economics of the transactions involved. By not looking at the underlying substance—even where a state agency and a state appellate court had found the existence of a harmful, non-arm's-length, affiliate relationship—the Commission approved a scheme which invites further abuses. The Commission's approach improperly disregarded the $400 million to $1.2 billion of additional MCV profits transferred to Consumers Power through Consumers Power's sale of worthless assets to MCV for $1.2 to $1.5 billion. When those additional MCV profits are added to Consumers Power's acknowledged 49% share of all remaining MCV profits, there can be no doubt that Consumers Power's total share of MCV profits (i.e., its actual ownership share) exceeds even the Commission's lenient ceiling of 50%. *See* 18 C.F.R. § 292.206(b).

The Federal Power Act, as amended by PURPA, and companion Michigan statutes instruct the Federal Energy Regulatory Commission and the Michigan Public Service Commission to regulate rates in accordance with just and reasonable, cost-based ratemaking standards. 16 U.S.C. § 824a-3(b) (1988); 16 U.S.C. §§ 824d, 824e; Mich. Comp. Laws 460.557. PURPA was designed to encourage the entry of *non*-utilities into the business of building power plants. *FERC v. Mississippi*, 456 U.S. 742, 750-51 (1982); *Puerto Rico Elec. Power Auth. v. FERC*, 848 F.2d 243, 249 (D.C. Cir. 1988). PURPA specifically provided that only facilities that are "owned by a person not primarily engaged in the generation or

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is not to just look away. It is to prevent an avoidance of regulation required under the Federal Power Act and state statutes, namely that rates be just and reasonable. 16 U.S.C. §§ 824d, 824e (1988); Mich. Comp. Laws 460.557 (1991). In addition, the Commission's orders are contrary to PURPA's requirement that qualifying facilities not be owned by utilities. 16 U.S.C. § 796(18)(B)(ii).

sale of electric power" qualify for the special PURPA rates and for exemption from certain federal and state regulations. 16 U.S.C. § 796(18)(B)(ii); 18 C.F.R. §§ 292.601, 292.602 (1993). The Federal Energy Regulatory Commission's orders fail to take into account the anti-competitive consequences of expanding the availability of the PURPA exemption to utility affiliates such as MCV. Thus, a pro-competitive statute designed to encourage non-utility market entrants is turned into a mechanism to effectively deregulate utility-owned and controlled power plants. The result creates incentives for utilities not to deal with truly independent power plant developers and instead to favor their own affiliates in order to maintain economic dominance and to generate excessive profits that increase rates.

If the Commission's orders are not reversed, the public —including the millions of people represented by the member municipalities of the Michigan Municipal League —will suffer not only from hundreds of millions of dollars in excessive electricity costs, but from an intolerable regulatory structure: deregulation plus disincentives to competition. Electricity rates are too important to Michigan's economy, and to the nation's economy, to permit such a result.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

RICHARD A. WEGMAN
Counsel of Record
GARVEY, SCHUBERT AND BARER
1000 Potomac Street, N.W.
Fifth Floor
Washington, D.C. 20007
(202) 965-7880
Counsel for
Michigan Municipal League

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No. 93-332

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MICHIGAN MUNICIPAL COOPERATIVE GROUP and
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Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION and
MIDLAND COGENERATION VENTURE, L.P.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for District of Columbia Circuit

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RESPONDENT MIDLAND COGENERATION VENTURE'S BRIEF IN OPPOSITION

ARNOLD H. QUINT
LAURA M. WILSON
HUNTON & WILLIAMS
P.O. Box 19230
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20036
(202) 955-1500

THOMAS G. SLATER, JR.*
R. HEWITT PATE
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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COUNTERSTATEMENT OF QUESTION PRESENTED

Did the Court of Appeals err in affirming FERC's application of established standards governing utility participation in PURPA "qualifying facilities" to an optional recertification review of the particular written record below?

LISTING OF AFFILIATES PURSUANT TO RULE 29.1

Pursuant to Rule 29.1, respondent Midland Cogeneration Venture Limited Partnership ("MCV") states that MCV is a limited partnership organized under the laws of the State of Michigan. The partners of MCV and their parent companies (where different) are listed below:

PARTNER	PARENT COMPANY
CMS Midland, Inc.	CMS Energy Corporation
MEI Limited Partnership	ABB Energy Ventures Inc.
C-E Midland Energy, Inc.	ABB Energy Ventures Inc.
Source Midland Limited Partnership	Panhandle Eastern Corporation
Micogen Limited Partnership	Fluor Corporation
Coastal Midland, Inc.	The Coastal Corporation
Alanna Corporation	Alanna Holdings
The Dow Chemical Company	

The following subsidiaries and affiliates of the parent companies of MCV partners have issued securities to the public:

CMS ENERGY CORPORATION

Consumers Power Company

PANHANDLE EASTERN CORPORATION

Texas Eastern Corporation
Texas Eastern Transmission Corporation
Panhandle Eastern Pipe Line Company
Trunkline Gas Company
Algonquin Gas Transmission Company

THE COASTAL CORPORATION

American Natural Resources Company
ANR Pipeline Company
Coastal Limited Ventures, Inc.
Colorado Interstate Gas Company

THE DOW CHEMICAL COMPANY

DesTec Energy, Inc.
Dow Corning Corporation
Marion Merrell Dow, Inc.

ABB, INC.

ABB Impell Corporation
ABB C-E Nuclear Power Inc.
ABB Phoenix Control Systems Inc.
ABB Transmission & Distribution Co. Inc.
ABB Process Automation Inc.
ABB Kent Taylor Inc.
ABB Lummus Crest Inc.
ABB Traction Inc.
ABB Flakt Inc.
Asea Brown Boveri Inc.
ABB Simcon Inc.
ABB Treasury Center [USA] Inc.
ABB Special Finance Inc.
ABB Finance Inc.
Combustion Engineering Inc.

By listing these subsidiaries and affiliates of parent companies, MCV does not intend to convey the impression that the companies listed are subsidiaries or affiliates of MCV or that they are subsidiaries or affiliates for any purpose other than this listing.

ABB Energy Ventures Inc. is a subsidiary of ABB, Inc., a subsidiary of ABB Asea Brown Boveri, Ltd., a foreign corporation.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for District of Columbia Circuit

---

RESPONDENT MIDLAND COGENERATION VENTURE'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

A counterstatement of the case is necessary because the petition repeats as "facts" many assertions that are merely petitioners' own characterizations, rejected below. At issue is a challenge by petitioners Michigan Municipal Cooperative Group ("MMCG") and the State of Michigan to recertifications issued by the Federal Energy Regulatory Commission ("FERC"). FERC found that the cogeneration facility ("the Facility") operated by Midland Cogeneration Venture Limited Partnership ("MCV") is a "qualifying facility" under § 3(18)(B) of the Federal Power Act (FPA), 16 U.S.C. § 796(18)(B) (1988), added by § 201 of the Public Utility Regulatory Policies

Act of 1978 ("PURPA"), Pub. L. No. 95-617, 92 Stat. 3117 (1978). A more balanced statement of the regulatory background, the facts concerning the MCV project, and the proceedings below demonstrates the absence of any issue warranting review by the Court.

1. Traditionally, the sale of electricity has been subpect to cost-based rate regulation. With the passage of PURPA, Congress provided that, at the wholesale level, certain "qualifying" cogeneration [1] facilities would be subject to a different regulatory scheme. The purpose of this aspect of PURPA was to encourage the development of "qualifying facilities" ("QFs") by providing market-based incentives for the creation of alternative forms of electric generation. *See generally American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, 461 U.S. 402, 414-415 (1983); *FERC* v. *Mississippi*, 456 U.S. 742, 746 (1982).

QFs are entitled to sell their power to a traditional electric utility at the utility's "avoided cost"—*i.e.*, the cost at "which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source." 16 U.S.C. § 824a-3(d). In essence, QFs take the business risk that they will be able to generate energy at a cost lower than the utility's "avoided cost." It is MCV's sale of power at the congressionally mandated avoided cost, as opposed to a presumably lower cost-based rate, that gives rise to petitioners' and *amicus* Michigan Municipal League's complaints of "higher rates," Pet. 3, and "windfall profits," Petition ("Pet.") 15; Brief of the Michigan Municipal League as

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[1] "Cogeneration" facilities are those that make use of heat or steam produced during the generation of electricity instead of allowing the heat or steam to be wasted by dissipation into the environment. *See* 16 U.S.C. § 796(18)(A). In the case of MCV, for example, MCV limited partner Dow Chemical Company makes use of the thermal energy produced by the plant's steam in its production facilities. Appendix to Petition ("Pet. App.") 99a.

Amicus Curiae in Support of Petitioners ("MML Br.") at 3.

The avoided cost rate at which a QF can sell power is established by the relevant state regulatory commission. *See* 16 U.S.C. § 824a-3(f); 18 C.F.R. 292.401. In this case, MCV's avoided cost is established by the Michigan Public Service Commission ("MPSC"), the state regulatory body whose authority the petition claims is ignored and undermined by the orders below, Pet. 23. That rate has been affirmed by the Michigan appellate courts. *Consumers Power Co.* v. *Public Service Commission*, 189 Mich. App. 151, 472 N.W.2d 77 (1991), *appeal denied*, 439 Mich. 992, 479 N.W.2d 644 (1992), *amended*, 442 Mich. 909, 503 N.W.2d 446 (1993). This Court has previously explained that the sale of QF power at avoided cost rates, by definition, leaves electric customers at least as well off as they would be in the absence of the sale, and does not increase rates. *American Paper Institute*, 461 U.S. at 415 n.9.

PURPA provides that to be a QF, a cogeneration facility must: (1) meet technical requirements as established in FERC rules, and (2) be "owned by a person not primarily engaged in the generation or sale of electric power." 16 U.S.C. § 796(18)(B). FERC's regulations provide standards by which FERC implements the PURPA ownership requirement. FERC's regulations require that electric utilities may not hold "more than 50 percent of the equity interest in the facility." 18 C.F.R. § 292.206. While petitioners previously advanced a plethora of technical and other challenges to the MCV project, the petition here essentially relates to the requirement that utility equity interest in a QF be less than 50 percent.

The technical and ownership requirements set forth above are the only prerequisites to qualification as a QF. *See* Pet. App. 194-96a; 18 C.F.R. § 292.205-207. The owner or operator of a QF is required to provide FERC with written notice of basic facts concerning the facility

and its operations, but is *not* required to submit information on the percentage of utility ownership in the project. Pet. App. 195a (citing 18 C.F.R. § 292.207(a)(2)). The regulations provide, however, for an *optional* procedure by which a cogeneration project may receive confirmation from FERC that its structure complies with the regulatory requirements. 18 C.F.R. § 292.207(b). This case involves such an optional certification procedure.

FERC has established that an optional QF certification is "in essence a declaratory order, based strictly on the facts presented." Pet. App. 192a. The procedure's "narrow scope" is limited to the facility's satisfaction of the technical and ownership criteria. Pet. App. 193a. As stated in a recent Fourth Circuit decision:

> In prescribing rules for QF certification, the FERC . . . established a set of objective criteria relating to fuel use, size and ownership. 18 C.F.R. §§ 292.203, 292.204, 292.206 (1990). It is thus apparent that a facility which meets these established criteria is automatically eligible for benefits under PURPA. 18 C.F.R. § 292.207(a)(1). Indeed, pursuant to the FERC regulations, the facility was not even required to apply to the agency for certification but could have opted for selfcertification. * * * *Id.* Accordingly, we conclude that the FERC does not have discretion to deny certification to any facility which meets the enumerated criteria and that its certification of this project was therefore merely a ministerial act."

Sugarloaf Citizens Ass'n v. *FERC*, 959 F.2d 508, 513 (4th Cir. 1992).

2. The MCV project was created to make productive use of facilities from utility Consumers Power Company's cancelled nuclear power facility in Midland, Michigan. MCV's cogeneration plant makes use of turbine-generators and other assets from the nuclear facility to produce electricity and steam. Pet. App. 8a-9a. In 1987, a Consumers Power subsidiary, CMS Midland, formed the MCV

partnership with other non-utility investors.[2] Under the agreement, MCV would purchase the assets of the nuclear plant for approximately $1.5 billion and use the assets to develop a cogeneration facility.[3]

CMS Midland filed an application with FERC for certification that the project satisfied QF requirements. *See CMS Midland, Inc.*, 38 F.E.R.C. ¶ 61,244 (1987). This application expressly raised two issues emphasized in the petition now before the Court: (1) the method by which the value of the plant assets to be exchanged for what are now known as the "MDC Notes" would be established; and (2) the initial setup of the project while CMS Midland held more than 50 percent of the equity and the timing for the subsequent reduction of this interest below 50 percent. 38 FERC at 61,827-28. Petitioners never intervened in this proceeding to object to either aspect of the MCV project. On March 12, 1987, FERC issued an order granting QF certification effective upon the operation of the facility. *Id.* at 61-829.

Subsequently, several amendments were made to the structure of the MCV project that led to the recertification applications at issue here. The MCV partnership agreement was amended in June 1988 to admit five new non-utility general partners and one non-utility limited partner. Pet. App. 11a. The amendment also reduced CMS Midland's equity interest in the facility to 49 percent. Pet. App. 11a-13a. In May 1989, the agreement

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[2] In applying the ownership standard, FERC draws no distinction between equity interest held by a utility and equity interest held by a utility's subsidiary, its holding company, or a subsidiary of its holding company. 18 C.F.R. § 292.206(b).

[3] FERC noted that "we cannot ignore the fact that this facility will make productive use of assets intended to be used in a cancelled nuclear unit. Whether the value is between $1.2-$1.5 billion as determined by the non-Consumers Power Partners, or some lesser value, there can be no argument with the fact that the value of these assets is significant. We simply do not see how the waste of these assets can be in the interest of this Nation." Pet. App. 107a.

was further amended so that CMS Midland's allocation of profits, losses, tax, and other benefits in the MCV project was also reduced below 50 percent. *Id.* Under the Commission's procedures, the QF status of a new facility—including the requirement that utility equity ownership be less than 50 percent—is evaluated on the basis of its structure on the date the facility begins operations. Pet. App. 72a. MCV began operating for testing purposes on June 2, 1989. Pet. App. 71a.

The new non-utility partners brought into the MCV project by the amendments placed conditions on their participation. They demanded that the amendments limit the amount to be paid by the partnership for the former nuclear plant assets to the lesser of the original $1.5 billion price of the assets or a negotiated amount that would allow the project to satisfy specified debt coverage ratios and achieve a projected 16 percent rate of return. Pet. App. 15a. The amendments also specifically excluded CMS Midland from the valuation negotiations. *Id.* In August 1989, the non-utility partners agreed with MEC Development Corp. ("MDC"), the Consumers subsidiary to whom the plant assets had been transferred, that MDC would receive approximately $1.2 billion in notes for the assets. Pet. App. 15a-16a.

3. In November 1989, MCV submitted the two optional applications for recertification of QF status that are at issue in the petition. On November 2, 1989, MCV submitted an application for recertification reflecting the changes to the partnership agreement described above, as well as certain technical changes in the plant's operations. Pet. App. 5a. MCV submitted a second recertification application on November 14, seeking confirmation that a proposed sale and leaseback financing arrangement would not alter the project's QF status. Pet. App. 114a.[4]

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[4] Third-party sale and leaseback financing is a common feature of cogeneration projects, which for tax and other reasons is often critical to securing cogeneration investors. *See generally Puerto*

Petitioners intervened in both recertification proceedings, raising a host of technical, ownership, and other objections to the recertification. They contended that MCV failed to satisfy FERC's "stream of benefits" and "control" tests for evaluating utility ownership percentage in a QF. Petitioners argued that the MDC Notes exchanged for the plant assets should be considered "equity" rather than "debt," Pet. App. 45a, and that the plant assets were overvalued, Pet. App. 46a-48a. They also contended that the establishment of power sales and other contractual arrangements during the time that CMS Midland owned over 50 percent of the project, but prior to the date MCV became operational, should cause FERC to find excessive utility control of the project. Pet. App. 71a.

FERC issued lengthy and comprehensive orders on January 31, 1990 and March 1, 1990 addressing all of petitioners' claims. Pet. App. 5a; Pet. App. 114a. In relevant part, FERC found that MCV satisfied FERC's established ownership criteria for QF status, and its order accordingly granted recertification. Pet. App. 36a. FERC noted that the MCV partnership agreement expressly limited both CMS Midland's voting rights and its share of profits, losses, and surplus to 49 percent. Pet. App. 38a-41a. It found that none of the other aspects of MCV's structure attacked by petitioners altered this fact.

FERC extensively examined the structure of the MDC Notes and their relations in the other financial obligations of MCV, and rejected petitioners' assertion that the MDC Notes should be recharacterized as "equity." Pet. App. 52a-56a. FERC examined the valuation of the assets and concluded that the expected revenue stream valuation method used was both "reasonable" and "typical of the

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Rico Electric Power Authority v. *FERC*, 848 F.2d 243, 248 (D.C. Cir. 1988).

give-and-take of any bargain struck between nonaffiliated parties." Pet. App. 55a.

FERC also rejected petitioners' argument that contractual arrangements put in place while CMS Midland owned over 50 percent of MCV—but *before* the facility became operational—gave Consumers excessive "control" over the facility. Pet. App. 72a. FERC noted that "all of the complained-of transactions preceded the initial operation date when, as we have found, MCV was in compliance with the ownership regulations." *Id.* FERC noted that it is common in cogeneration projects to "have such things as fuel supply and power purchase contracts in place before seeking equity investors as partners." *Id.* The Commission found that the non-utility investors had control of MCV both by virtue of their 51 percent voting power and their ability to control MCV's business dealings. *Id.*

FERC also thoroughly addressed the issues on which petitioners claim the agency "turned its back," Pet. 13. With respect to petitioners' contention that FERC should undertake a broad review of the "competitive implications" of MCV's QF status, FERC noted that matters beyond compliance with PURPA's technical and ownership requirements are outside the established scope of a recertification proceeding. Pet. App. 34a-35a, 87a ("this is not the proper proceeding to address these claims"). FERC also specifically addressed the gas contracts the petition claims it ignored, and concluded that petitioners' argument that the contracts were inconsistent with FERC's precedent was unfounded. Pet. App. 67a, 76a.

Petitioners filed petitions for rehearing challenging FERC's orders. FERC again noted that "a QF certification order is essentially a declaratory order, based strictly on the facts presented," and that the scope of the proceeding is limited to compliance with "the Commission's ownership and technical requirements." Pet. App. 160a. "We reiterate these points here because the Inter-

venors' arguments on rehearing constitute little more than a rehashing of their original arguments in this recertification proceeding." *Id.* FERC denied the rehearing petitions on the same grounds stated in the original orders. Pet. App. 161a.

Petitioners also made several "Supplemental Filings" under various titles, each filed *after* the jurisdictional time limit for rehearing, seeking to provide "additional support . . . for the argument that the MCV facility is owned or controlled by Consumers." Pet. App. 157a. The Supplemental Filings represented an attempt to show excess utility ownership in MCV "through a myriad of subarguments about facility contracts, the worth and nature of facility assets, Consumers' role in the development of the project, relations among CMS Energy subsidiaries, and a hodge-podge of other alleged facts of similar import." Pet. App. 167a. Among the arguments contained in the Supplemental Filings were the contention that FERC was bound to follow findings of the Michigan Public Service Commission, Pet. App. 174a, and that MCV sought to "evade [state] regulation," Pet. App. 171a—arguments now relied upon in the Petition for Certiorari, *see* Pet. 23-25.

FERC rejected the Supplemental Filings, stating: "we . . . have no authority to waive the statutory jurisdictional requirement by extending the time for filing rehearing materials." Pet. App. 163a (citing *Boston Gas Co.* v. FERC, 575 F.2d 975 (1st Cir. 1978); *Columbia Gas Transmission Corp.*, 40 F.E.R.C. ¶ 61,195, 61,655 (1987)). Nonetheless, FERC examined the untimely materials to determine whether, if they were timely, they would provide any basis to alter the recertification decisions. FERC found that they would not. Pet. App. 159a, 189-90a. Many of the arguments were "purely speculative and appear to express no more than the Intervenors' opinions." Pet. App. 174a. In summary, the Commission stated: " 'There must be an end to litigation, and in any

event, these documents either do not show what they purport to show, or are irrelevant to the issues of the proceeding.'" Pet. App. 168a (quoting *Municipal Electric Utilities Ass'n* v. *Power Authority of the State of New York*, 48 FERC ¶ 61,124, *aff'd sub nom. Allegheny Electric Cooperative, Inc.* v. *FERC*, 922 F.2d 73 (2d Cir. 1990), *cert. denied*, 112 S. Ct. 55 (1991)).

Petitioners next appealed to the United States Court of Appeals for the D.C. Circuit. Following extensive briefing and oral judgment, a panel consisting of Chief Judge Edwards, Judge Sentelle, and Judge Henderson unanimously affirmed FERC's orders on March 26, 1993. They did so in an unpublished order pursuant to D.C. Circuit Rule 14, which allows for disposition without full opinion where the case neither "alters, modifies, or significantly clarifies a rule of law," "criticizes or questions existing law," "creates a conflict with another circuit," nor "warrants publication in light of other factors that give it general public interest." Petitioners filed petitions for rehearing and suggestions for rehearing *en banc*. No member of the Court of Appeals requested a poll of the Court, and rehearing was denied on June 2, 1993.

REASONS FOR DENYING THE WRIT

Petitioners' real complaint is with Congress' decision that public utilities may participate in QFs under PURPA. Petitioners failed, however, to preserve this question below and it is not before the Court. *See* Sup. Ct. R. 15.1. Petitioners are thus left with an attack on FERC's application of its utility ownership standards to the particular facts presented here, which itself depends heavily on improper non-record materials. Reexamination of the substantial evidence and detailed analysis supporting the Court of Appeals' affirmance of FERC's recertification orders is a factbound task that does not warrant certiorari.[5]

[5] MCV renews its contention that petitioners lack the jurisdictional prerequisite of standing to assert their claims. As has been

I. PETITIONERS' PROCEDURAL DEFAULTS AND RELIANCE UPON UNTIMELY NON-RECORD MATERIALS PRECLUDE A GRANT OF CERTIORARI

Petitioners have failed to preserve the broad attack on *any* utility participation in QFs that animates their claims. Even as to the narrow challenge to FERC's application of its own standards that is properly before the Court, petitioners rely substantially on untimely non-record materials. These procedural problems would make certiorari inappropriate even if a significant legal question were presented.

A. Petitioners Failed to Preserve Their Challenge to FERC's Regulation Allowing Utility Participation in QFs

In the Court of Appeals, petitioners forthrightly argued that FERC's ownership standard—allowing fifty percent ownership of QFs by utilities—violated Section 201 of PURPA, 16 U.S.C. 796(18)(B), which requires that QFs be "owned by a person not primarily engaged in

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pointed out in earlier litigation, the MMCG petitioners are engaged in an ongoing campaign of using regulatory proceedings to pressure Consumers Power into selling ownership interests in its transmission system. *See Michigan Public Power Agency* v. *FERC*, 963 F.2d 1574, 1579 (D.C. Cir. 1992) ("As the Commission recognized, the Group really wants an ownership interest in the transmission system. But the Group made no showing that Consumers has any legal obligation to allow its competitors to become its partners."). The Michigan Attorney General participated in MPSC proceedings setting the avoided cost price for MCV power, but was largely unsuccessful in that forum. *See Consumers Power Co.* v. *Public Service Commission*, 189 Mich. App. 151, 472 N.W.2d 77 (1991), *appeal denied*, 439 Mich. 992, 479 N.W.2d 644 (1992), *amended*, 442 Mich. 909, 503 N.W.2d 446 (1993). While petitioners may have a strategic agenda, they lack standing to challenge MCV's recertification because the harm they allege is not directly traceable to the Facility's recertification nor likely to be redressed by the ruling they seek. *See generally Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992).

the generation or sale of electric power." They contended that *any* degree of utility participation in QFs violates the statute. Petitioners failed, however, to assert this claim in their petitions for rehearing before FERC. (J.A. 1233.1-1369.) This default imposes a strict jurisdictional bar against consideration of this argument on appeal. *Department of Interior* v. *FERC*, 952 F.2d 538, 544 (D.C. Cir. 1992). Moreover, the argument is also barred because petitioners failed to seek judicial review of FERC's rule within 60 days of its promulgation as required by law. *See* 16 U.S.C. § 825*l*(b); *Raton Gas Transmission Co.* v. *FERC*, 852 F.2d 612, 615 (D.C. Cir. 1988).

Petitioners do not directly raise the basic issue of utility participation in QFs here. Nonetheless, the petition contains numerous references suggesting that it raises issues concerning the proper contruction of PURPA. *See* Pet. 13 ("permitting electric utilities to own qualifying facilities under PURPA . . . undercuts both federal and state electric rate regulation"), 14 ("PURPA prohibits utility ownership of QFs."), 16 ("statutory language would support, if not mandate, a more restrictive standard"). Because of petitioners' failure to preserve the issue, no such question is before the Court. Petitioners' opaque references should not obscure the fact that the only question presented involves FERC's *application* of the standards established in its own regulations and decisions to the specific facts presented.[6]

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[6] Even if a challenge to the validity of FERC's regulation were before the Court, it would raise no substantial issue. PURPA allows utility participation in QFs. *See* H.R. Conf. Rep. No. 1750, 95th Cong., 2d Sess. 89 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7797 ("Electric utilities may participate in an entity which owns [qualifying] facilities with other persons and such entity could qualify under these definitions. The test of this case is whether the entity which owns the facility is primarily engaged in [utility activities] . . . .").

B. The Petition Relies Upon Arguments and Factual Assertions that Were Excluded Due to Violation of a Jurisdictional Time Limit

Throughout the petition, heavy reliance is placed on arguments and materials that were first presented in the Supplemental Filings rejected by FERC as jurisdictionally out of time.[7] This material is not properly part of the record before the Court. Because the petition involves no challenge to FERC's exclusion of this material as untimely, petitioners' citations to the material are improper. The petition's failure to disclose this defect in the record is in itself a sufficient reason for denial of certiorari. *See* Sup. Ct. R. 14.5.

Two of petitioners' arguments in favor of certiorari are based almost exclusively on the untimely Supplemental Filings. Ten of the twelve J.A. citations in petitioners' allegation at pages 5-6 that the plant assets were overvalued are to untimely non-record material. *See* Pet. 5 (citations to J.A. 1969, 1923, 1929, 1932, 1935-43, 1944, 1947, 1948, 1963-69; R. 3822.QQ-3822.TT). *Every* record citation in petitioners' argument that FERC failed to accord proper weight to findings of the MPSC is to untimely non-record material. *See* Pet. 11-12 & n. 14 (citations to J.A. 1375-76, 1379, 1372, 2066-71, 1376, 1477-79); Pet. 23-25 (citations to J.A. 1372, 1375-76, 1379, 2066-71, 2070). Indeed, the argument concerning the MPSC opinions was itself part of the untimely Supplemental Findings. *See* Pet. App. 174a.

Petitioners rely on further citations to untimely arguments and material throughout their petition. *See, e.g.*, Pet. 5 (description of MCV contracts, citing J.A. 1481-83, 1481-82 [sic]); Pet. 6 (management and control of MCV,

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[7] The following material was presented by petitioners only in their untimely Supplemental Filings: Record pages (cited in the petition as "R.") 2307-2462, 2477-2545, 2550-3254, 3262-3822, 3823-3838, and 3843-3851; Joint Appendix pages (cited in the petition as "J.A.") 1372-1406, 1407-1483, 1484-2064, 2065, 2066-71.

citing J.A. 1374-79); Pet. 20 (negotiation of contracts, citing J.A. 1532); FERC official's attendance at ribbon-cutting ceremony, citing J.A. 1404-06); Pet. 26 (rate differential caused by PURPA avoided cost standard, citing J.A. 1920-73). Even if significant legal issues were presented, this case would be an inappropriate candidate for certiorari.

II. THE COURT OF APPEALS' AFFIRMANCE OF FERC'S APPLICATION OF ITS REGULATORY STANDARDS TO PARTICULAR FACTS PRESENTS NO ISSUE MERITING REVIEW

The petition ultimately involves run-of-the-mill complaints about FERC's application of its own established recertification procedures and precedents to particular facts. Petitioners' alarms of "profound issues of federalism and comity," Pet. 14, with economic consequences on a par with "the stock market crash in 1929," Pet. 30, are the same brand of strident mischaracterization that FERC and the D.C. Circuit rejected. The routine review of an agency decision presented here is not a matter for the Court's certiorari jurisdiction. *See, e.g., Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 310 (1974); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

A. The Orders Below Represent the Application of Established Standards to a Particular Record, Amply Supported by Substantial Evidence

The petition merely presents the same factual arguments that petitioners unsuccessfully presented to FERC and the Court of Appeals. In its attack on evaluation of the "stream of benefits" and "control" issues in the orders below, petitioners do not present any clear issue of law, nor do they contend that the Court of Appeals' affirmance creates a conflict of authority. *Cf.* Sup. Ct. R. 10. FERC aptly described the nature of this dispute in rejecting petitioners' contention that its decision would encourage utilities to convert plants into QFs and avoid regulation:

"QF certifications are fact-based and hence must be decided on a case-by-case basis." Pet. App. 173a. This is what was done below.

In evaluating utility ownership interest in MCV, FERC followed its established precedents. As it has consistently done in the past, FERC examined the partnership structure based on its "stream of benefits" and "control" tests. *See* Pet. App. 45a, 69a; *Dominion Resources, Inc.*, 43 F.E.R.C. ¶ 61,079 at 61,250-51 (1988); *KP Diversified Investors, Inc.*, 32 F.E.R.C. ¶ 61,013 at 61,050 (1985); *Ultrapower 3*, 27 F.E.R.C. ¶ 61,094 at 61,184 (1984). While the petition claims that FERC "abandoned its ownership test" in recertifying MCV, Pet. 16, FERC cited and discussed the same precedents petitioners claim it abandoned.

As described above, FERC thoroughly addressed petitioners' claims concerning the "stream of benefits" with respect to asset valuation and found the anticipated revenue valuation method reasonable. Pet. App. 55a. FERC also examined petitioners' "control" arguments relating to the facility's contracts, finding that MCV was in compliance with ownership requirements as of its operational date, and that the non-utility partners continued to exercise majority control. Pet. App. 72a. FERC addressed each of the other factual objections relied upon in the petition. Petitioners' disappointment that FERC found their assertions to be unsupported, speculative, or irrelevant to the certification process provides no basis for the Court's intervention.

B. None of Petitioners' Various Other Complaints About the Proceedings Below Warrants the Court's Review

Petitioners' various additional objections concerning FERC's procedures do not warrant review. First, as discussed above, the contention that FERC was required to follow rulings of the MPSC is not properly before the

Court because of its untimely presentation below. In any event, FERC was manifestly correct in holding that it was not bound by MPSC decisions. The MPSC did not address or decide any qualifying facility certification issue under PURPA, over which FERC has exclusive jurisdiction. *See* Pet. App. 175a. Petitioners' suggestion that *University of Tennessee* v. *Elliott*, 478 U.S. 788 (1986), requires FERC deference to the MPSC is without merit. *Elliott* dealt with prior determinations under particular civil rights statutes, and did not involve any administrative agency, much less FERC or PURPA.[8]

Petitioners' contention that FERC was required to grant discovery and a hearing is similarly unfounded. PURPA does not require hearings regarding determinations of QF status. *See* 16 U.S.C. § 796(18)(B)(i). This Court has previously rejected the argument that FERC decisions on PURPA issues require formal evidentiary hearings in the context of the statute's interconnection proceedings. *See American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, 461 U.S. 402, 420 (1983) (recognizing that burdening the process with hearings would "seriously impede the very development of cogeneration . . . Congress sought to facilitate"). FERC's use of declaratory orders as opposed to evidentiary hearings is a longstanding practice that advances Congress' goal of minimizing

[8] As for the so-called "profound issues of federalism" presented by this issue, Pet. 14, petitioners beg the only question really presented—whether MCV meets FERC's certification standards for QFs. If, as FERC and the D.C. Circuit found, it does, MCV's entitlement to the benefits of PURPA simply reflects the decision of Congress. To say that PURPA's avoided cost provisions might override a contrary policy preference of a state utility commission is merely to point out the constitutionally obvious. *See* U.S. Const., Art. VI, cl. 2 (Supremacy Clause). In any event, the MPSC itself has issued an order *encouraging* utility ownership of QFs. MPSC, *Final Order in the Proceedings to Implement Provisions Set Forth in Title II, Section 210, of the Public Utility Regulatory Policies Act (PURPA) of 1978 re Cogeneration and Small Power Production*, No. U-6798, 48 P.U.R.4th 465 (Aug. 27, 1982).

the regulatory burdens on cogeneration entities seeking QF status. *See, e.g., Sithe/Independence Power Partners, L.P.*, 61 F.E.R.C. ¶ 61,212 (1992); *Cogentrix of Mayaguez, Inc.*, 59 F.E.R.C. ¶ 61,392 at 62,494 (1992); *Wyoming Wind Power, Inc.*, 34 F.E.R.C. ¶ 61,152 at 61,261 (1986).[9]

Because PURPA does not require hearings, FERC has broad discretion in formulating its certification procedures. *See, e.g., Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 544-46 (1978). The Court of Appeals affirmance of FERC's orders on the record it reviewed is entirely consistent with that court's precedents. *See, e.g., Louisiana Ass'n of Independent Producers and Royalty Owners* v. *FERC*, 958 F.2d 1101, 1113-15 (D.C. Cir. 1992) (no hearing needed where questions can be adequately resolved on written record); *Woolen Mills Assoc.* v. *FERC*, 917 F.2d 589, 592 (D.C. Cir. 1990) (court uses "abuse of discretion" test to review FERC's decision not to hold a hearing). Petitioners' suggestion that the particular facts here call for an exception to FERC's normal procedure provides no basis for certiorari.

FERC also properly rejected petitioners' demands that it consider competitive effects, rate impact, and a smorgasbord of other matters outside the proper scope of a recertification proceeding, *see* Pet. 22-23, which is limited to compliance with PURPA's technical and ownership requirements, Pet. App. 34a-35a, 87a. Petitioners' claims about "excessive rates" are nothing more than an invitation to revisit choices that Congress made in allowing utilities to participate in PURPA's QF provisions, includ-

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[9] Petitioners' citation to *Public Affairs Associates, Inc.* v. *Rickover*, 369 U.S. 111 (1962), as contrary to FERC's use of declaratory order procedures in the PURPA certification process, is woefully off point. The case had nothing to do with PURPA, with FERC, or with any agency procedure similar to FERC's certification procedure.

ing the sale of power at avoided cost.[10] Petitioners' arguments concerning MCV's rates and the undermining of state regulation are particularly ironic in light of the fact that it is the MPSC that sets the avoided cost rate that MCV may charge. *See* 18 C.F.R. § 292.101(b)(6).

Finally, the hyperbolic contentions of petitioners and their *amicus* that the orders below will increase electricity costs throughout the Nation, Pet. 25, MML Br. 6, undermine state utility regulation, *id.*, and imperil the financial health of the Nation's utilities, Pet. 13, are further makeweight arguments that beg the question of MCV's compliance with FERC's regulations. If, as FERC found, MCV complies with the agency's regulations for QFs, then MCV is entitled to the benefits Congress chose to bestow on QFs in PURPA. This Court has already addressed and rejected the central thrust of petitioners' claim—that decisions under PURPA should be subject to principles of cost-based rate regulation under the Federal Power Act. *See American Paper Institute*, 461 U.S. at 414 ("Congress did not intend to impose traditional ratemaking concepts on sales by qualifying facilities to utilities"). To the extent electric rates under the PURPA scheme (as reviewed by the MPSC) differ from those petitioners would prefer, their proper forum is Congress.

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[10] As the Commission put it: "The fact that qualifying status will relieve the facility of regulation that Consumers Power might otherwise face were it a part of the utility's rate base is irrelevant. That is a benefit conferred on such facilities by section 210 of PURPA." Pet. App. 69a, 171a.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

ARNOLD H. QUINT
LAURA M. WILSON
HUNTON & WILLIAMS
P.O. Box 19230
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20036
(202) 955-1500

THOMAS G. SLATER, JR.*
R. HEWITT PATE
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200

* Counsel of Record

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No. 93-332

In the Supreme Court of the United States

OCTOBER TERM, 1993

MICHIGAN MUNICIPAL COOPERATIVE GROUP, ET AL.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

SUSAN TOMASKY
General Counsel

JEROME M. FEIT
Solicitor

JOSEPH S. DAVIES
Deputy Solicitor

TIMM L. ABENDROTH
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission properly found that a public utility did not own more than 50% of a cogeneration facility and that therefore the facility was entitled to be certified as a "qualifying cogeneration facility" under the applicable statutory provisions and regulations.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is unpublished, but it is noted at 990 F.2d 1377 (Table). The opinions of the Federal Energy Regulatory Commission (Pet. App. 5a-113a, 114a-153a, 154a-185a, 186a-207a) are reported at 50 F.E.R.C. ¶ 61,098; 50 F.E.R.C. ¶ 61,259; 56 F.E.R.C. ¶ 61,177; and 56 F.E.R.C. ¶ 61,361.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on March 26, 1993. A petition for

rehearing was denied on June 2, 1993. Pet. App. 3a. The petition for a writ of certiorari was filed on August 31, 1993. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. 1254(1).

STATEMENT

1. Section 210(a) of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. 824a-3(a), directs the Federal Energy Regulatory Commission (FERC) to prescribe rules under which electric utilities must provide power to and purchase surplus power from "qualifying cogeneration facilities." Section 201(18)(A) of PURPA, 16 U.S.C. 796(18)(A), defines a "cogeneration facility" as "a facility which produces—(i) electric energy, and (ii) steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes." The statute defines a "qualifying cogeneration facility" (QF) as a cogeneration facility that, *inter alia*, "is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities)." 16 U.S.C. 796(18)(B).

To implement the congressional restriction limiting ownership of a QF to "a person not primarily engaged in the generation or sale of electric power," the Commission promulgated a rule in 1980 providing that not "more than 50 percent of the equity interest in the facility * * * [may be] held by an electric utility or utilities, or by an electric utility holding company, or companies, or any combination thereof." 18 C.F.R. 292.206(b). In applying that rule in the case of a cogeneration facility owned by a partnership, in which equity interests cannot be measured by common stock holdings, the Commission analyzes the utility's

equity interest by analyzing the utility's share of the facility's "stream of benefits," based on the utility's entitlement to profits, share of losses, and allocation of surplus after the return of its initial capital contribution, as well as the utility partner's share of "control" over the venture. See, *e.g.*, *Ultrapower 3*, 27 F.E.R.C. ¶ 61,094, at 61,184 (1984); *KP Diversified Investors, Inc.*, 32 F.E.R.C. ¶ 61,013 (1985); *Dominion Resources*, 43 F.E.R.C. ¶ 61,079 (1988).

2. This case arises from the plan of Consumers Power Company (CPC), a gas and electric utility serving customers in Michigan, to convert its abandoned nuclear plant in Midland, Michigan, into a gas-fired cogeneration plant. In 1987 CMS Midland, a subsidiary of CPC, entered into an agreement with other companies to form a partnership, the Michigan Cogeneration Venture Partnership (MCV), that would purchase certain assets of CPC's abandoned nuclear plant for approximately $1.5 billion, use the assets to construct a cogeneration facility (the Midland facility), and then sell the electric energy it produced to CPC. CMS Midland filed an unopposed application with the Commission to certify the project as a QF, and the Commission granted QF certification based on CMS Midland's representation that any equity interest held by a public utility would not exceed 50% by the time the facility went into operation. *CMS Midland, Inc.*, 38 F.E.R.C. ¶ 61,244 (1987).

Subsequently, the structure of MCV was significantly altered. See Pet. App. 10a-16a. The partnership now consisted of six partners not affiliated with CPC or an electric utility, and CMS Midland, the CPC subsidiary. Under the new arrangement, CMS Midland's voting interest in the facility was

limited to 49%, and its allocation of profits, losses, and tax and other benefits was reduced to 49%. CMS Midland was also barred from participating in negotiations to determine the consideration to be paid by the partnership to another CPC subsidiary for the abandoned Midland nuclear plant assets. In August 1989, the non-CMS partners agreed to pay the CPC subsidiary approximately $1.2 billion for the Midland assets, subject to a downward or upward adjustment (to a maximum of $1.5 billion) based on the ultimate "avoided cost" finding that, under PURPA, determines the price that the QF could charge for its power. See 16 U.S.C. 824a-3(d).

After the facility had gone into operation, MCV submitted two applications to FERC for recertification of the Midland facility as a QF. The first application reflected the addition of the new partners and certain changes in the technical configuration of the plant, and the second requested the Commission to certify that a proposed sale and leaseback of the facility (see Pet. App. 118a-122a) would not interfere with the facility's QF status.[1]

Petitioners intervened in both proceedings. They urged the Commission to deny the applications on the ground that the proposed arrangements failed to satisfy the Commission's "stream of benefits" and "control" tests because, when the amount of the partnership's payments for CPC's Midland plant assets was taken into account, CPC would actually "control" MCV, within the meaning of FERC's ownership test.

[1] Sales and leasebacks are a common means of financing cogeneration projects and were specifically contemplated by Congress in enacting PURPA. See *Puerto Rico Elec. Power Auth.* v. *FERC*, 848 F.2d 243, 248 (D.C. Cir. 1988).

3. In an order issued January 31, 1990 (Pet. App. 5a-113a), the Commission concluded that the Midland facility qualified as a QF. *Id.* at 36a-37a.

The Commission found that the partnership agreement limited CMS Midland's voting rights and its rights to profits, losses, and surplus to 49% and that no other provision in the agreement would alter the fact that CMS Midland's right to the stream of benefits from the project would not exceed that limitation. Pet. App. 40a-44a.

The Commission also rejected petitioners' claim that CMS Midland retained more than 49% control over the operations of the facility because important decisions regarding the facility's basic operations had already been made by CPC before it had restructured the ownership of MCV. Pet. App. 72a. Agreeing with CMS Midland that FERC's regulation governing certification, 18 C.F.R. 292.206, is applied as of the date the "facility enters initial operation—not before" (Pet. App. 71a-72a), the Commission concluded that CPC could not be deemed to have denied the other partners effective control "by virtue of having structured all the salient agreements pertaining to MCV operation prior to effecting the transfer" of the facility. *Id.* at 72a. Moreover, the Commission concluded from its experience with cogeneration financing that it "is not atypical" for a cogeneration developer to have such matters as fuel supply and power purchase contracts in place before seeking equity investors as partners. *Ibid.* The Commission further observed that "the non-CMS general Partners do have control, not merely by virtue of the fact that they have 51% of the management committee voting power, but also by virtue of the fact that that power

means they may act to affect MCV business dealings" in the future. *Ibid.*

The Commission also determined that CPC's transactions with MCV did not afford CPC any special advantages, such as service contracts with favorable terms or the right to loan money to the partnership at noncommercial interest rates, that might reflect a disproportionate share of the expected stream of benefits from the project. Pet. App. 73a-77a. The Commission likewise concluded that the contracts between MCV and CPC for the sale of power generated by the facility to CPC contained no "hidden benefit" for CPC. *Id.* at 76a. Accordingly, the Commission ruled that there was no obstacle to certifying the facility as a QF.

On March 1, 1990, the Commission issued a second recertification order determining that the sale and leaseback of the facility were consistent with the facility's QF status. Pet. App. 114a-153a.

4. Petitioners sought rehearing of both Commission orders, but the Commission denied rehearing. Pet. App. 154a-185a, 186a-207a.

5. On March 26, 1993, the court of appeals affirmed the Commission's orders without opinion, "substantially for the reasons stated [in the FERC orders]." Pet. App. 2a.

ARGUMENT

The decision of the court of appeals upholding the Commission's fact-based finding that no more than 50% of the MCV facility is owned by a public utility is correct and is not in conflict with any decision of any other court. The Commission's finding is, moreover, based on substantial evidence and the Commission's

settled interpretation of its own regulations. Further review by this Court therefore is not warranted.

1. Petitioners chiefly argue (Pet. 15-23) that the Commission overlooked evidence showing that, although CPC formally owns only a 49% interest in MCV, the balance is tipped to majority control when other factors are taken into account. Relying on the Commission's "stream of benefits" test, petitioners argue that CPC realized additional benefits by obtaining an inflated price from MCV for its plant assets (Pet. 16-20), by entering into advantageous long-term contracts with MCV (Pet. 20-21), and by obtaining a variety of other benefits (Pet. 21-22).

The Commission properly found that petitioners' claims in this regard are unavailing. For example, as the Commission explained, the plant assets were valued by the non-affiliated members of MCV in negotiations from which any CPC affiliate was excluded from participating on MCV's behalf. The methodology for valuing the assets was reasonable and did not reflect exercise of any market power by CPC,[2] and the

---

[2] Specifically, the Commission found that it was reasonable to value the assets in terms of the expected revenue stream that they could produce. See Pet. App. 55a-56a. Although that is not the only possible way to value an asset, it certainly is a permissible way to do so. That method was perhaps particularly appropriate in this case, because the revenue stream itself is fixed by the Michigan Public Service Commission's determination of CPC's "avoided cost"—*i.e.*, the amount that CPC would have had to pay for the same power from a non-QF source. See p. 11, *infra*. In other words, if the assets sold to MCV could profitably produce power for which MCV could charge a competitive rate, it was reasonable for FERC to conclude that those assets have a value that is commensurate with what MCV paid for them.

unaffiliated partners conducting the negotiations were able to extract significant concessions from the CPC-affiliated owner. Pet. App. 54a-56a. Similarly, the Commission found that MCV's long-term contracts with CPC reflected prestructuring of business arrangements typical of cogeneration financing; that the contracts were negotiated prior to initiation of the plant's operation, by which time the CPC affiliate's interest was below the 50% limitation; and that the unaffiliated partners controlled the MCV management committee, which was responsible for overseeing the contracts. *Id.* at 72a.

Based on those findings, the Commission was justified in concluding that, as of the time the MCV facility went into operation, CPC did not "control" the facility, and that CPC's ownership interest in the facility therefore posed no obstacle to certification of the facility as a QF under the Commission's regulations.

2. Petitioners also argue (Pet. 23-25) that FERC failed to give preclusive effect to the findings of the Michigan Public Service Commission regarding the close relationship between CPC and MCV, contrary to this Court's decisions in *University of Tennessee* v. *Elliott*, 478 U.S. 788 (1986), and *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966).

Initially, petitioners' argument that FERC inappropriately rejected findings of the Michigan Public Service Commission was advanced only in a supplemental filing that FERC rejected as untimely. See Pet. App. 159a, 168a. Although FERC also rejected petitioners' argument on its merits in an alternative holding, see *id.* at 174a-176a, petitioners' failure properly to present their argument to FERC provides

an independent basis for FERC's rejection of their argument and for the court of appeals' affirmance on this point.

In any event, petitioners' reliance on *Elliott* and *Utah* is misplaced. Issue preclusion arises only when another forum has decided the same issue or fact in earlier litigation between the same parties or their privies. See, *e.g.*, *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 (1979). As the Commission pointed out, the Michigan Public Service Commission did not find that CPC had power to direct the MCV project, and thereby divert the stream of benefits, or that CPC "controlled" MCV within the meaning of FERC's PURPA regulations. Pet. App. 172a-175a. Findings of the Michigan Public Service Commission on other issues could not preclude FERC's authority to determine the application of its regulations to this case.

In addition, neither *University of Tennessee* v. *Elliott*, *supra*, nor *United States* v. *Utah Construction & Mining*, *supra*, involved the preclusive effect of a prior determination on a later federal administrative proceeding. And in *Elliott*, the Court held that findings of a state administrative agency should *not* be given preclusive effect in federal court Title VII litigation, see 478 U.S. at 795-796, though they may have such effect in civil rights litigation under other federal statutes. See *id.* at 796-799. In each instance, the scope of preclusion depended on the particular statutory scheme at issue. See also *Astoria Federal Sav. & Loan Ass'n* v. *Solimino*, 111 S. Ct. 2166, 2169 (1991). This case arises under PURPA, which explicitly divides authority between FERC and state public utility agencies and which gives FERC—not the state agency—authority to

determine whether a cogeneration facility is entitled to QF status. See 16 U.S.C. 796(18)(B).

Finally, the court of appeals reviewed the decision in this case under a statute providing that "[t]he finding of the Commisssion as to the facts, if supported by substantial evidence, shall be conclusive." 16 U.S.C. 825*l*(b). That standard of review demonstrates Congress's intent to give FERC substantial discretion to reach its own determinations based on the record before it. In light of that standard, even if a FERC order disagreed with a prior state administrative finding, and even if the disagreement revolved around a particular question of historical fact, the court of appeals would have no choice but to affirm the FERC order so long as it was supported by substantial evidence in the record before FERC.

3. Petitioners argue (Pet. 25-30) that FERC's orders will encourage utilities to invest in cogeneration facilities and thereby undermine the competitive goals of PURPA and the consumer protection goals of the Federal Power Act, of which PURPA is a part.

Petitioners' argument is insubstantial. Congress sought to foster cogeneration through various rate and deregulatory incentives contained in PURPA. See *American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, 461 U.S. 402, 406-407, 413-418 (1983). As the Commission pointed out when it adopted its cogeneration regulations, Congress intended that utilities could participate in cogeneration projects. Order No. 70, 1977-1981 Stats. & Regs. [Regs. Preamble] (CCH) ¶ 30,134, at 30,953 & n.29 (1980), citing the Conference Report on H.R. 4018, 95th Cong., 2d Sess. (1978) (PURPA), H.R. Conf. Rep.

No. 1750, 95th Cong., 2d Sess. 89 (1978). FERC's regulations properly implemented those congressional goals. To the extent that petitioners disagree with that conclusion, their complaints are tantamount to an impermissible collateral attack on FERC's regulations, which were adopted in 1980 and upheld by this Court in *American Paper Institute*. See, *e.g.*, *Raton Gas Transmission Co.* v. *FERC*, 852 F.2d 612, 615 (D.C. Cir. 1988) (exceptions to the principle that a party must seek timely review of an agency's rulemaking orders are narrowly circumscribed and generally limited to situations such as where the agency did not put aggrieved parties on notice of the rule's content).

In any event, as the FERC orders in this case repeatedly noted (*e.g.*, Pet. App. 35a, 85a-87a, 138a, 148a), any legitimate complaints petitioners may have about the rates CPC will pay MCV for energy from the project are still subject to regulatory oversight by FERC, the Michigan Public Service Commission, and the courts. In particular, FERC properly rejected petitioners' suggestion (Pet. 26-27) that FERC should have taken into account their claim that the rates for MCV power have been or will be set so high that consumers will suffer substantial injury. Under PURPA, the Michigan Public Service Commission—not FERC—must set the rate for MCV energy based on CPC's full avoided cost, *i.e.*, the "cost to the electric utility of the electric energy which, but for the purchase from such cogenerator * * *, such utility would generate or purchase from another source." 16 U.S.C. 824a-3(d). As this Court has observed, "when utilities purchase [such cogenerated electricity] * * *, the rates the utilities charge their customers will not

be increased, for by hypothesis the utilities would have incurred the same costs had they generated the energy themselves or purchased it from other sources." *American Paper Institute*, 461 U.S. at 415 n.9. Insofar as petitioners' true claim is that the Michigan Public Service Commission erred in setting the full avoided cost for MCV power, petitioners' remedy is with that body.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

SUSAN TOMASKY
General Counsel

JEROME M. FEIT
Solicitor

JOSEPH S. DAVIES
Deputy Solicitor

TIMM L. ABENDROTH
Attorney
Federal Energy Regulatory Commission

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OCTOBER TERM, 1993

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Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF OF THE MICHIGAN MUNICIPAL COOPERATIVE GROUP AND THE STATE OF MICHIGAN

FRANK J. KELLEY
Attorney General
State of Michigan

THOMAS L. CASEY
Solicitor General
State of Michigan

LUIS F. FERNANDEZ
Assistant Attorney General in Charge

LARRY F. BRYA
Assistant Attorney General

Special Litigation Division
630 Law Building
P.O. Box 30212
Lansing, MI 48909
(517) 373-1123
Counsel for the State of Michigan

ROBERT A. JABLON *
THOMAS C. TRAUGER
MARK S. HEGEDUS

SPIEGEL & McDIARMID
1350 New York Avenue, N.W.
Suite 1100
Washington, D.C. 20005-4798
(202) 879-4000
Counsel for Michigan Municipal Cooperative Group

November 1993

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF OF THE MICHIGAN MUNICIPAL COOPERATIVE GROUP AND THE STATE OF MICHIGAN

The Michigan Municipal Cooperative Group (MMCG) and the State of Michigan submit this reply to the briefs in opposition filed by the Midland Cogeneration Venture (MCV Br.) and for the Federal Energy Regulatory Commission by the Solicitor General (FERC Br.).

I. THIS CASE MERITS REVIEW BECAUSE OF ITS MULTI-BILLION DOLLAR RATE IMPACT AND ITS ADVERSE IMPACT ON MARKET COMPETITION

MMCG and the State of Michigan have shown that, despite a statute prohibiting utilities from owning "qualifying cogeneration facilities" (QFs) under the Public Utility Regulatory Policies Act (PURPA), 16 U.S.C. § 796(18)(B)(ii) (1988), FERC certified a utility-owned and controlled facility as "qualifying" for special rate benefits, thereby exempting its rates from normal rate

regulation. MCV (MCV Br. at 14) and FERC (FERC Br. at 6-7) attempt to treat this case as a run-of-the-mill regulatory decision. Until this case, FERC interpreted its regulations prohibiting utility ownership of QFs by requiring QFs to comply with two independent limitations: (1) a utility may not receive more than 50% of the benefits from a QF, and (2) a utility may not control a QF. (See Pet. at 7-8, 15-16) Here, FERC effectively drops the control test and ignores $1.2 billion in the utility's share of benefits (or, by FERC's own test, project ownership). The following table (distilled from Pet. at 5-6) shows the nature and magnitude of the problem:

Normal cost of this type plant	$800 million
Total cost of MCV Plant	$ 2.3 billion
which includes:	
Amount of MCV payment to CPC for abandoned nuclear assets	$ 1.2 billion

FERC and MCV do not answer how the utility's non-arm's-length arrangement with its affiliate, MCV, to be paid $1.2 billion for assets to be included in a plant, when the entire plant should have cost only $800 million, is anything other than a transfer of benefits to the utility. FERC has effectively announced a new rule violating, and gutting FERC's own long-standing interpretation of, PURPA's prohibition against utility ownership of QFs.

If this case merely raised issues of asset valuations, the Supreme Court might not deem it worthy of review (although the magnitude of the rate impact, combined with FERC's blatant disregard for statutory standards, might suggest otherwise). But, here, FERC has acted contrary to its own regulations and to PURPA. The effect will be to deregulate a substantial portion of electric rates, contrary to PURPA, the Federal Power Act and state law. The cost to electricity users and the economy will be billions of dollars.

MCV and FERC do not deny these adverse impacts, except by denying the premise that the utility owns MCV (MCV Br. at 18; FERC Br. at 10-11), which is addressed below. Perhaps even more significantly, and di-

rectly contrary to federal enactments and this Court's precedent, *see, e.g., Gulf States Utils. Co. v. FPC*, 411 U.S. 747 (1973), the result will be to reinforce electric utilities' monopoly control of generation, whereas the statute was intended to promote competing generation plants independent of utilities. As this case illustrates and Congress recognized, if utilities can own QFs, the incentives and opportunities for self-dealing are so great that utilities will find every way to prefer purchases from affiliated generators rather than independents.[1] Because FERC's decision controls regulation at the state level (see Pet. at 25), FERC's abandonment of its statutorily-imposed duties prevents adequate state regulation as well.

II. MCV AND FERC FAIL TO ANSWER KEY ISSUES AS TO OWNERSHIP AND CONTROL

MCV and FERC do not address many of the troubling questions raised by FERC's orders. Without addressing the merits of Petitioners' arguments, MCV assumes that it is entitled to QF status and the benefits that flow from it. (MCV Br. at 16 n.8, 18) Neither MCV nor FERC fully confronts the language of the statute. PURPA clearly states that QFs may be owned only "by a person not primarily engaged in the generation or sale of electric power. . . ." 16 U.S.C. § 796(18)(B)(ii). Congress thus sought to encourage non-utilities to enter the cogeneration field. *FERC v. Mississippi*, 456 U.S. 742, 750-51 (1982); *Puerto Rico Elec. Power Auth. v. FERC*, 848 F.2d 243, 249 (D.C. Cir. 1988). This goal, along with PURPA's market-based incentives, *see American*

[1] Unfortunately, if such utility self-dealing is countenanced, this Court's observation will no longer hold true that "when utilities purchase electric energy from qualifying facilities at full avoided cost rather than at some lower rate, the rates the utilities charge their customers will not be increased, for by hypothesis the utilities would have incurred the same costs had they generated the energy themselves or purchased it from other sources." *American Paper Institute, Inc. v. American Elec. Power Serv. Corp.*, 461 U.S. 402, 415 n.9 (1983). The utility, as happened here, will distort the avoided cost rate determination by seeking higher, not lower, rates for QFs. See Section III, *infra*.

Paper Institute, Inc. v. American Elec. Power Serv. Corp., 461 U.S. 402, 414-15 (1983), is defeated by improper utility involvement in QFs. Even if some minority utility ownership of QFs is accepted, the language and goals of PURPA require FERC to protect against utilities' manipulating their amount of ownership interest and, through contracts with affiliates, receiving the majority of benefits from purported QFs.

MCV and FERC do not address the heart of Petitioners' demonstration that FERC has violated both PURPA and even its own, more generous "stream of benefits" and control tests. As to the utility ownership prohibition, MCV (MCV Br. at 15) and FERC (FERC Br. at 7-8) continue to rely on the illogical conclusion in FERC's orders that MCV's unaffiliated investors' acceptance of the $1.2 billion asset price establishes that the payment was not a mechanism to transfer profits to the utility. The fallacy lies in FERC's erroneous assumption that the unaffiliated investors could control whether Consumers Power Company's (CPC) share of the total profits (or benefits) from the project exceeded 50%. They could not, and MCV and FERC do not assert otherwise. Thus, FERC establishes a sham test allowing utility ownership of QFs, directly contrary to statute.

The other owners' ability to police the price of the assets was limited by the contract between CPC and MCV (signed while CPC was still the admitted 90% owner of MCV), which only prohibited an asset price so high that the remaining profits would not suffice to meet the unaffiliated investors' prescribed minimum investment returns. (See Pet. at 17-19) The outside investors had no ability to limit the asset price to the true cost of obtaining equivalent assets independently. Because CPC controlled the project from the outset, the only way the outside investors could participate in the deal was on CPC's terms. Thus, the inflated component of the asset price, approximating $1.2 billion, constituted a transfer exclusively to CPC of potential MCV profits. Those transferred profits, when added to CPC's 49% share of all other MCV profits,

pushed CPC's ownership share well above even FERC's generous limit of 50%.[2]

In support of their claims that FERC adequately analyzed CPC's control over ~~MCV,~~ MCV and FERC rely (MCV Br. at 8; FERC Br. at 8) on FERC's assertion below that it is common for developers to enter into contracts prior to the operation of a cogeneration facility. Merely pointing this out does not address the fact that the contracts passed to CPC significant benefits and effective control over MCV for periods of up to 35 years. Moreover, CPC did not establish a QF and then sell its entire interest to non-utility owners. When still a 90% owner of the project, CPC set up contracts between itself and MCV to be paid $1.2 to $1.5 billion for the nuclear assets, to establish future prices for its purchase of the project's output, and to provide for future gas supply, financing, management and other aspects of the project. Although CPC later reduced its stated interest to 49% to *facially* comply with FERC's regulations, it maintained active involvement in all aspects of the project. In light of this, FERC was obligated to scrutinize the contracts among the owners. *See Allegheny Elec. Coop., Inc.*, 47 FERC ¶ 61,015 at pp. 61,053-55 (1989) (even where there is a technical divestiture, control may remain and bar QF certification). MCV (MCV Br. at 15) and FERC (FERC Br. at 8) also rely on FERC statements that the unaffiliated partners could exercise majority control and oversee the contracts. As pointed out in the Petition (at 21), FERC's explanation that the preexisting contracts did not establish control because the new 51% partners could breach them is preposterous, and neither opposing brief seeks to defend it. FERC's obligation to protect against improper utility ownership and control of QFs demands more.

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[2] Both MCV (MCV Br. at 6) and FERC (FERC Br. at 4) point out that CMS Midland did not participate in the negotiations over the price of the assets. However, another CPC affiliate, MEC Development Corporation (MDC) was involved as seller of the assets. (MCV Br. at 6) CMS Midland and MDC shared the same chairman with MCV. (JA-1282, JA-1479, JA-2067)

MCV's contentions that FERC was not obligated to hold a hearing and that it has broad discretion to formulate its own procedures (MCV Br. at 16-17) do not overcome FERC's obligation to follow its own substantive regulations. *Columbia Broadcasting Sys., Inc. v. United States*, 316 U.S. 407, 422 (1942); *United States v. Nixon*, 418 U.S. 683, 695-96 (1974) (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-68 (1954)). Even though a QF may self-certify, where FERC is asked to find that a facility is a QF, it must act consistently with statutory standards. If the Commission does not fairly consider relevant facts or issues, then its exercise of discretion should not be upheld. *Udall v. FPC*, 387 U.S. 428, 434 (1967); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 612-13 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). Here, FERC permitted improper utility ownership of a QF, contrary to both PURPA and its own regulations. The decisions below are an invitation to other utilities to engage in similar activities, which will distort electricity markets, limit regulatory authority and, ultimately, increase electricity rates nationwide. (See Pet. at 25-30)

III. FERC'S ACTIONS IMPAIR STATE REGULATION

MCV (MCV Br. at 2, 17, 18) and FERC (FERC Br. at 11-12) claim that MMCG and the State of Michigan's real complaint is not with FERC but with the avoided cost rate set by the MPSC. FERC's erroneous recertification of MCV is indeed the root of the problem, because it has distorted the regulatory process by which the State of Michigan sets its avoided cost rates. Unlike an independent purchasing utility, which has an incentive to keep the avoided cost rate low, CPC, as creator and owner of MCV, has huge economic inventives to avoid dealing with independent QFs, to negotiate *high* rates for MCV power, and to fight for a *high* avoided cost rate before the MPSC, all contrary to its interests as a utility and to the public's interest. It is FERC's action, not the MPSC's, that entitles MCV to the special PURPA rates and to exemption from state regulations that might normally be

expected to protect ratepayers from the injuries caused by utility self-dealing.

In asserting that the state can control the QF rate, MCV ignores limitations under state law[3] on the ability of regulatory commissions to control this rate, including limitations created by the exemptions received as a result of the very decisions MCV defends. The MPSC has itself recognized the evils inherent in the non-arm's-length MCV-CPC dealings and its inability to effectively control them. (See Pet. at 11-12, 28; see also JA-590) Perhaps recognizing these factors, Congress gave FERC the authority to certify QFs, and it is no excuse for FERC's failure to perform its statutory duty to say that the states may help partially alleviate the consequences of that failure.

State regulation and principles of federalism are also impeded when FERC refuses to give any weight, if not preclusive effect, to state administrative decisions. MCV (MCV Br. at 16) and FERC (FERC Br. at 9) maintain that the MPSC did not decide the identical issues of control for purposes of PURPA that were before FERC, and thus contend that FERC was not obliged to give preclusive effect to the MPSC's findings. However, the MPSC made specific findings regarding the identity of interests between MCV and CPC, the lack of arm's-length dealings, and the blurring of corporate identities. (See Pet. at 11-12)[4] These findings went to the control determination FERC had before it, yet FERC refused to give these findings any weight. This Court has found that factual findings relevant to issues properly before the fact-finding agency could have preclusive effect before a second

[3] The law will vary in each state. For example, in Michigan the avoided cost rate underlying a QF contract can be fixed for 17½ years, Mich. Comp. Laws § 460.6j(13)(b)(ii), and the MPSC's ability to limit managerial discretion over the utility's choice of suppliers has been construed to be limited. *Consumers Power Co. v. Pub. Serv. Comm'n*, 189 Mich. App. 151, 472 N.W.2d 77 (1991), *leave denied*, 439 Mich. 917, 479 N.W.2d 644 (1992).

[4] Describing CPC's renegotiation of an MCV contract, the MPSC stated the problem clearly: "one must wonder whether Consumers has once again negotiated with itself and lost." (JA-590-91)

agency, even where the first agency would not have had jurisdiction to decide the precise issue before the second agency. *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 418-19 (1966). Thus, the findings made by the MPSC that bore upon FERC's control determinations should have been given preclusive effect. At minimum, they could not be ignored without FERC's either providing a rational explanation for doing so or making a factual investigation, especially where FERC's decisions, based upon *unexamined* factual assumptions (Pet. App. 32a, 148a-50a, 192a), could become the basis for preempting state authority.

MCV (MCV Br. at 16) and FERC (FERC Br. at 9) also attempt to distinguish *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), on grounds that it did not concern the preclusive effect of a prior determination on a federal agency. Neither explains why the principles underlying collateral estoppel, *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 (1979), should be any less applicable when the forum is a federal agency instead of a federal court.[5] FERC also suggests that in PURPA, like in Title VII, Congress intended that state administrative agency determinations not be given preclusive effect. (FERC Br. at 9, citing *Elliott*, 478 U.S. at 795-96) However, unlike Title VII, PURPA contains nothing, and FERC points to nothing, that indicates congressional intent to prohibit FERC from considering the MPSC's findings.

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[5] While FERC claims that so long as its disagreement over an issue with a state administrative finding is supported by substantial evidence, the court of appeals should have to uphold it (FERC Br. at 10), the "substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Here, FERC refused to investigate evidence that contradicted its conclusions that CPC did not control MCV and ignored the findings of the MPSC, which had conducted extensive hearings. (See JA-1485-1919)

IV. RESPONDENTS' CLAIMS OF PROCEDURAL DEFECTS ARE INSUBSTANTIAL

MCV's and FERC's claims (MCV Br. at 9, 13; FERC Br. at 8-9) concerning alleged "defects" in the record are unavailing. They incorrectly claim that MMCG and the State of Michigan have not raised FERC's exclusion of supplemental materials. The Petition does raise this issue. (Pet. at 21) FERC based its decision on the application presented and admittedly refused to look behind it. (Pet. App. 32a, 148a-50a) Thus, the "record" basis for the decision consists essentially of MCV's assertions. Materials in opposition were mainly petitions requesting agency investigation, which were refused.

FERC does not deny that it had discretion to accept the supplemental materials which MMCG and the State of Michigan presented as a motion to lodge or a motion to reopen the record. (Pet. App. 162a-68a); *see also Udall v. FPC*, 387 U.S. at 434; *Ohio Bell Tel. v. Pub. Utils. Comm'n*, 301 U.S. 292, 300-06 (1937). Nevertheless, FERC refused to accept them because it deemed them irrelevant on the basis that FERC could consider the MCV QF application to be correct without any investigation. (Pet. App. 32a, 148a-50a) Because the Petition assigns error to the Commission's refusal to accept the proffered materials (Pet. at 21-23), the issue is before this Court.[6]

As for MCV's claim (MCV Br. at 10-12) that Petitioners failed to preserve their challenge to FERC's regulation allowing utility participation, MMCG and the State of Michigan did raise the issue, arguing that the 50% level was too high and that, to the extent the regulation conflicted with the statute, the statute controlled. (JA-1248-49, JA-1251, JA-1254-55) MCV's claim, that Petitioners' challenge is barred because it was not raised at the time the rule was promulgated (MCV Br. at 12), ignores that where "an aggrieved party has a valid excuse

[6] In any event, other bases for granting the writ remain and are supported by materials timely filed by any measure (including MPSC findings). (See, e.g., JA-585-93)

for failing to challenge the initial order promulgating a regulation," it is permissible to challenge the regulation when it is applied. *Raton Gas Transmission Co. v. FERC*, 852 F.2d 612, 615 (D.C. Cir. 1988). MCV's approach would flood agencies with interventions every time a rule is promulgated, because all potentially interested parties would be required to protect against speculative harms the rule might cause, if applied to future (unknown) projects. Moreover, the Court can reverse the court of appeals' affirmance of FERC without reaching the issue, given the clear demonstration that MCV does not meet even FERC's generous 50% ownership test or its control test.[7]

CONCLUSION

For the foregoing reasons and for the reasons stated in the Petition for Certiorari, the Court should grant the writ and reverse.

Respectfully submitted,

FRANK J. KELLEY
Attorney General
State of Michigan

THOMAS L. CASEY
Solicitor General
State of Michigan

LUIS F. FERNANDEZ
Assistant Attorney General in Charge

LARRY F. BRYA
Assistant Attorney General

ROBERT A. JABLON *
THOMAS C. TRAUGER
MARK S. HEGEDUS
SPIEGEL & MCDIARMID
1350 New York Avenue, N.W.
Suite 1100
Washington, D.C. 20005-4798
(202) 879-4000
Counsel for Michigan Municipal Cooperative Group

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[7] MCV's "renewed" contention that Petitioners lack standing is similarly without merit. (MCV Br. at 10 n.5) MMCG members and Michigan citizens purchase power from CPC at rates that (now or in the future) will include the costs of CPC's purchases of high cost power from MCV, which claims QF status. In addition, some MMCG members have excess capacity to sell and compete directly with MCV in the power supply market; MCV's QF certification assertedly permits CPC to purchase from MCV instead of from cheaper sources. *See* 16 U.S.C. § 824a-3(a) (1988). Petitioners' actual injuries are ongoing and result from MCV's claimed QF status.

Special Litigation Division
630 Law Building
P.O. Box 30212
Lansing, MI 48909
(517) 373-1123
Counsel for the State of Michigan

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* Counsel of Record